(24,666)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 429.

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

H. W. OTOS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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1 STATE OF MINNESOTA,
County of Yellow Medicine:

District Court.

H. W. OTOS, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, a Corporation, Appellant.

Complaint.

Plaintiff for his complaint in the above entitled action alleges and shows to this Court,

1st. That the defendant now is and at all times herein mentioned was and has been a Railway corporation, and as such the owner and operator of a line of railroad extending into and through the
2 States of Minnesota and South Dakota and other states, and defendant has been at all times herein mentioned engaged in hauling passengers and freight on said line of railroad for hire as a common carrier.

That said line of railway of said defendant extends into and through the City of Granite Falls, in the County of Yellow Medicine, State of Minnesota; and that said defendant has and maintains a railway depot and station agent at said City of Granite Falls, Minnesota.

2nd. That on the 11th day of September, 1912, and for some time prior thereto this plaintiff was in the employ of said defendant as a brakeman and switchman, and in the course of his employment was compelled to and did work in and about said railway yards in said city of Willmar, Minnesota; and that among other duties it was the duty of plaintiff to assist in the switching of freight cars and to couple and uncouple freight cars and do and perform other necessary work in the switching of the same, and such work as is common to brakemen and switchmen generally.

3rd. That on or about the 11th day of September, 1912, and while said plaintiff was so engaged as a servant and employee of defendant, and while he was in the performance of his duties as a brakeman and switchman for said defendant, and while he was about to uncouple one of the railway freight cars of said defendant from an adjoining car, which cars formed part of a train of cars then being moved in said switch yards in said City of Willmar, said defendant negligently, unlawfully and contrary to the statutes and laws of the United States in such cases made and provided, hauled and
3 used, and then and there had upon its said railway line in said City of Willmar, Minnesota, and in and about which plaintiff was compelled to work, in moving interstate traffic, a certain car equipped with a certain automatic coupler, which said coupler, and the appliances thereof and connecting therewith were

then and there in such a defective, broken and inoperative condition of repair that the same could not be uncoupled from the side of said car without the necessity of defendant's switchman or brakeman going between the end of said car and the car from which the same was to be uncoupled; and plaintiff further alleges that it then and there became and was the duty of this plaintiff to said defendant, as such switchman and brakeman, to uncouple said car, so equipped with said defective, broken and inoperative coupler, from a certain other car then standing upon the same track and connected with and coupled to said car containing said defective, broken and inoperative coupler; and as a direct result, and in consequence of said defective, broken and inoperative condition of said coupler this plaintiff was then and there required to and did go between the ends of said cars for the purpose of uncoupling said cars and for the purpose of working said defective, broken and inoperative coupler so that said cars could be uncoupled, and that while plaintiff was so between the ends of said cars for the purpose of and engaged in the work aforesaid, the said cars were being moved on said track by one of defendant's engines, and that while plaintiff was between said cars one of his feet became caught and held fast between a
4 certain guard rail then located in said yard and a main rail in said yard, and that plaintiff was thereupon run over by several cars of said defendant whereby he suffered the injuries hereinafter set forth.

4th. That it was the duty of said defendant to keep the space between the guard rail and the main rail at the point where plaintiff was injured properly and sufficiently guarded or blocked so as to prevent injuries to employees, but that said defendant not regarding its said duty, wrongfully and negligently neglected and omitted to properly and sufficiently guard or block said space and in consequence thereof, and also by reason of defendant furnishing such unsafe, defective and inoperative coupler as hereinbefore set forth plaintiff's foot was caught and held in said space between said guard rail and main rail and he was run over and received the injuries herein complained of.

5th. That the injuries hereinbefore complained of occurred to plaintiff by reason of the violation of the statutes and laws of the United States requiring the defendant to have its cars used in interstate traffic equipped with automatic couplers, which could be coupled and uncoupled without the necessity of men going between the ends of the cars and by reason of the violation by said defendant of other statutes and laws of the United States enacted for the benefit of employees of interstate carriers by railroad while engaged in interstate commerce, and that had said defendant not violated said statutes this plaintiff would not have been compelled to go between the ends of said cars to make such a coupling and he would not have been injured as herein alleged.

5 6th. That the car which contained said defective, broken and inoperative coupler was loaded with merchandise and had been shipped from a point in the State of South Dakota, to a point in the state of Minnesota, and when said car was in said city

of Willmar, Minnesota, it was enroute from the state of South Dakota to the city of Minneapolis, Minnesota. That said car was being used in the transportation of interstate commerce and was being used in the hauling of merchandise from the State of South Dakota into the State of Minnesota, and that said defendant now is an interstate carrier by railroad, and was at all times herein mentioned such interstate carrier, and is and was at all times herein mentioned engaged in operating said line of railroad where plaintiff was injured as an interstate carrier and that said line of railroad is an interstate railroad.

7th. That the coupler of said car which ran over plaintiff was so defective, broken and inoperative, that said car could not be uncoupled from or coupled to another car without the necessity of some one going between the ends of the cars and lifting the pin, which was intended to hold the coupling appliance together. That the rod intended to be used in lifting said pin from said coupling appliance was broken, defective and inoperative, and by reason thereof it was necessary in order to uncouple said cars from an adjoining car for men to go between the end of said car and said adjoining car.

8th. That it was the duty of said defendant to have said car equipped with a coupler which could be uncoupled without the necessity of men going between the ends of the cars to so uncouple
6 the same. But that said defendant negligently, recklessly and unlawfully failed and neglected to comply with the laws of the United States regarding said couplers, and negligently failed to fulfill its duty of having the same so equipped with proper couplers as it was its duty by law to do.

9th. That by reason of all the facts hereinbefore alleged plaintiff was severely, painfully and permanently injured in that the lower portion of his left foot was torn loose from the ankle, plaintiff was run over and his left leg severed and torn from his body, and that plaintiff received severe and permanent injuries to his back, spine, kidneys, liver and sexual organs; and that by reason of said accident plaintiff received a severe and permanent shock to his nervous system, and that plaintiff, in addition to the injuries herein enumerated, received other severe and permanent injuries, the extent and precise nature of which plaintiff is unable to ascertain at this time.

10th. That said plaintiff at and prior to the time of the injuries herein complained of was an able bodied, strong and healthy man and was able to and did earn at his work from one hundred and five ($105.00) Dollars to one hundred and fifteen ($115.00) Dollars per month, and that by reason of the injuries herein complained of the plaintiff has been permanently crippled and disabled and will never again be able to do any manual labor whatsoever.

11th. That by pleading the specific acts of negligence herein recited plaintiff does not waive the right to plead any other
7 acts of negligence not herein recited and not inconsistent with the acts herein set forth.

12th. That by reason of all the facts hereinbefore alleged and by

reason of said injuries to plaintiff plaintiff has been damaged in the sum of Eighty Thousand ($80,000.00) Dollars, together with his costs and disbursements herein.

Wherefore, plaintiff demands judgment against the said defendant for the sum of Eighty Thousand ($80,000.00) Dollars, together with his costs and disbursements herein.

DAVIS AND MICHEL,
Plaintiff's Attorneys,
Marshall, Minnesota.

Dated this 8th day of October, 1913.

STATE OF MINNESOTA,
County of Yellow Medicine:

District Court, Twelfth Judicial District.

H. W. OTOS, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Answer.

The defendant answering the complaint of the plaintiff herein:

1. Admits that the allegations contained in paragraph 1 of plaintiff's complaint are true.

2. Admits that the plaintiff, H. E. Otos, was on or about the 11th day of September, 1912, employed by this defendant as a brakeman and switchman.

3. Admits that while this plaintiff was so employed he did receive personal injuries in that a car of this defendant ran over his left leg and severed the same from his body, but defendant denies that plaintiff received any injuries other than herein admitted.

8 4. Defendant further answering alleges that such personal injuries as the plaintiff received, whether in his complaint described or otherwise were not caused by any negligent act or omission of this defendant, but were caused solely by plaintiff's own contributory negligence and carelessness.

5. Defendant further answering alleges that the work in which the plaintiff was employed and engaged at the time of his injury involved certain dangers, risks and hazards which are incident to such work, all of which said dangers, risks and hazards plaintiff well knew and appreciated and all of which plaintiff assumed, that plaintiff's injuries resulted from the dangers, risks and hazards so appreciated and assumed by plaintiff as aforesaid.

6. Except as hereinbefore admitted or qualified, defendant denies each and every allegation and each and every part of each and every allegation in plaintiff's complaint contained.

Wherefore, defendant prays that plaintiff take nothing by this

action and that it have judgment for its costs and disbursements herein.

Dated, St. Paul, Minn., October 22, 1913.

M. L. COUNTRYMAN,
A. L. JANES,
Attorneys for Defendant, 203 Great Northern Building, St. Paul, Minnesota.

STATE OF MINNESOTA,
County of Yellow Medicine:

District Court, Twelfth Judicial District.

H. W. OTOS, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Reply.

Plaintiff for his reply to the answer of the defendant in
9 the above entitled action alleges and shows to this Court:

Plaintiff denies each and every allegation, and each and every part thereof in said answer contained, except as the same admits the allegations of plaintiff's complaint.

Wherefore, plaintiff prays judgment as demanded in his said complaint.

DAVIS AND MICHEL,
Plaintiff's Attorneys, Marshall, Minnesota.

Dated this October 28th, 1913.

STATE OF MINNESOTA,
County of Yellow Medicine:

District Court, Twelfth Judicial District.

H. W. OTOS, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

This cause was called for trial at 10 a. m. January 26, 1914, before Hon. S. A. Flaherty, a district judge of the 16th judicial district, this state, and a jury.

Davis & Michel and P. D. Stratton appeared as attorneys for plaintiff.

Johnson & Lende, M. L. Countryman and A. L. Janes appeared as attorneys for the defendant.

Recess.

A jury was duly impaneled and sworn.

Mr. Tom Davis opened the plaintiff's case to the jury.

It is stipulated that car number 125896, being the car upon which

plaintiff was working at the time of his injury, was a car loaded with wheat, delivered to the defendant company at Willow Lake, South Dakota, to be transported by it out of said state of South Dakota and into and through the state of Minnesota, and that it was hauled by defendant in interstate commerce from Willow Lake, South Dakota, to Willmar, Minnesota, where it arrived shortly previous to the time of the plaintiff's injury. The foregoing fact is not disputed.

It is further stipulated that said car upon which plaintiff was working was consigned from Willow Lake, South Dakota, to the city of Minneapolis, Minnesota.

Mr. JANES: I reserve the right here to show what was done with that car after it came to Willmar.

It is further stipulated that said car on the following day, after the accident, was taken by said defendant company from Willmar to the city of Minneapolis, its point of destination.

Mr. JANES: I presume that is correct, if I find that it is not, or if *if* wasn't the next day, we will offer to show what the fact is. But I think that is true.

I don't presume that there is any doubt at all but what these tracks at Willmar were used for switching with cars loaded with interstate commerce and intra-state commerce, that the tracks were so used; there can't be any doubt about that.

Mr. DAVIS: Including the track upon which the plaintiff was injured?

Mr. JANES: I suppose there can be no doubt about that.

H. R. OTOS was called as a witness on behalf of the plaintiff, and duly sworn.

Direct examination.

By Mr. DAVIS, as follows:

Q. What is your name?
A. H. R. Otos.
Q. You live where?
A. Willmar, Minnesota.
Q. How long have you lived there?
A. All my life.
Q. How old are you?
A. I will be 24 in May.
Q. You are a brother of the plaintiff here on the cot (indicating man on cot in front of jury)?
A. Yes, sir.
Q. Mr. Otos, during the last few years by whom have you been employed?
A. Great Northern Railway Company.
Q. Are you now in their employ?

Objected to as immaterial.

COURT: Objection overruled.

A. No, sir.
Q. In what capacity did you work for them, as switchman?
A. As switchman, call-boy and yard-clerk.
Q. Were you employed there in the fall of 1912 when your brother was injured?
A. Yes, sir.
Q. Were you present at Willmar in the yards at the time of his injury?
A. Yes, sir.
12 Q. Were you there at the time or shortly after the time his leg was cut off?
A. Yes, sir.
Q. Where were you?
A. I was about 500 feet up the lead from where he had his leg taken off.
Q. Did you see your brother as he lay between the cars outside from the rail?
A. Yes, sir.

Objected to as leading. No ruling.

Q. Just turn to the jury and tell them what you saw as to your brother lying there on the rail?
A. I was 500 feet up from the track,—from where he was hurt and laying outside of the rail, I heard him 'holler' three times, he raised up three times and grabbed the stump of his leg, and when he raised the third time he throwed his gloves away. When he threw them, the third time, then he laid still there, and I started to run down that way and by that time there was two other switchmen that picked him up, and put him on the engine, and I threw the switch so that they could get out on the main line and take him to the hospital.
Q. This car number 125896, I will ask you whether you examined the car between which the defective pin-lifter was, where your brother was hurt?
A. Yes, sir.
Q. Did you take the number of that car?
A. Yes, sir.
Q. What was that number?
A. 125896.
Q. I hand you Exhibit A (shown witness) upon which
13 appears the letter- G. N. 125896, and ask you if that is the car by which your brother laid at the time?
A. Yes, sir.
Q. Is that the car upon which the pin-lifter was missing?
A. Yes, sir.

Mr. DAVIS: We offer in evidence Exhibit A, a photograph.
Mr. JANES: Do I understand this picture is just to show the condition of the end of the car?
Mr. DAVIS: Yes.
Mr. JANES: No objection.

Q. In reference to the condition of this car as shown on Exhibit

A with the pin-lifter missing, I will ask you if that was its condition on the day your brother was injured?

A. Yes, sir.

Q. That is, you saw it?

A. Yes.

Mr. JANES: We will admit that the pin-lifter was missing at the time of the accident.

Q. Now, Mr. Otos, I wish you would turn to the jury and tell the jury the purpose of that pin-lifter upon that car?

A. That pin-lifter is put there for switching cars, the disconnecting rod when you uncouple a car, you pull that pin-lifter up, that is what it is used for. That car—if the pin-lifter isn't on there, why you will have to step between.

Mr. JANES: I ask to have the latter part of the answer, if the pin-lifter isn't there, you have to step in between the cars, — as not responsive to the question.

14 COURT: I think I will let the answer stand, it is fairly responsive.

Mr. DAVIS: I consent that that last part be stricken out.

Q. I hand you Exhibit E, and you may state whether or not that exhibit and drawing substantially represents the purpose of a pin-lifter upon the end of a car?

A. Yes, sir, it does.

Q. I will ask you whether or not the pin end of the pin-lifter goes beyond the side of the car or not, so that you can read it at the outside of the car?

A. Yes, sir, you can read it from the outside of the car.

Q. Does the handle of the pin-lifter as a rule go outside of the side of the car?

A. Some do, and some don't,—some just like they are in here (indicating Exhibit E).

Q. This pin-lifter as shown by Exhibit E, what purpose does it serve here as to the couplings?

A. Why a car can't be uncoupled unless it is pulled by that.

Q. In case it is gone,—the pin-lifter is gone, how else can it be uncoupled?

Mr. JANES: Objected to as calling for the opinion or conclusion of the witness.

Mr. DAVIS: Question withdrawn.

Q. How long have you worked in yards, at switching?

A. Three years or over.

Q. During that time did you have occasion at various times to do switching operations?

A. Yes, sir.

15 Q. And did you have occasion at various times to know what is done in case pin-lifters were gone?

A. Why, yes.

Q. Will you state in the absence of a pin-lifter if there is anything upon the car by which the car can be coupled with another

car or disconnected from another car except by a person stepping in and lifting up the pin-lifter?

A. There is no other way you can disconnect it.

Mr. DAVIS: We offer in evidence Exhibit E for the purpose of illustration.

Mr. JANES:

Q. Do you mean the pin-lifter or pin?

A. Why the pin, if the pin-lifter is gone, I would have to get the pin.

Mr. JANES: You don't contend that exhibit is a drawing from the car in question, or of the car in question?

Mr. DAVIS: No, not at all.

Mr. JANES: Nor that it is a drawing of the style of coupler that was on the car in question?

Mr. DAVIS: No.

Mr. JANES: Objected to on the ground that no foundation is laid, and as incompetent.

Mr. DAVIS: Offer withdrawn. I offer in evidence Exhibits B and C.

Mr. JANES: No objection if introduced for the purpose of showing that of car 125,896, as has been agreed to, but not as to any other car shown.

Mr. DAVIS: My understanding with you was that I was not to bring Mr. Forssberg down here but could read his testimony, and show that these cars were connected that way. We will show that.

16 Mr. JANES: That this other car that was shown there was connected to the car at the time of the accident?

Mr. DAVIS: You mean that same car which now appears on Exhibit C to be connected to car 125,896, and that it was connected with it at the time of the accident?

Mr. JANES: At the time of the accident.

COURT: That this particular car?

Mr. JANES: Yes.

Mr. DAVIS: We don't ask you to do that; we don't know that ourselves.

Q. I will ask you if the point X on Exhibit C is diagonally across from the cross on Exhibit B where the pin-lifter is missing, the point here where the pin-lifter shows diagonally across on the car?

A. On the other side, yes.

Q. Will you explain to the jury how these pin-lifters when they are equipped upon the cars, with reference to the ends of the cars, on which side of the car and where they are on the car, or which end? Do you understand my question?

A. Why, if the car would be standing here, there would be——

Mr. JANES: What do you mean by standing here?

Q. I will ask you this: Here is a pin-lifter shown on Exhibit C, on the end opposite the end from which the pin-lifter is missing on the car in question shows a pin-lifter at one end of the car?

A. Yes, sir.

Q. And on the side upon which the words "Hopper bottom" appears?

A. Yes, sir.

17 Q. Now, I will ask you to state whether or not on the same end, on the other side, whether there is any pin-lifter at all?

A. On the same side, same end, or the other side?

—. —— ——.

A. Across the track, yes.

Q. Same end?

A. No, sir.

Q. On the same side of the car as shown in Exhibit C but at the other end, I will ask you whether or not there is any pin-lifter, over on this same side?

A. No, sir, not on the same side.

Q. Then as I understand it, if the pin-lifter is as appears upon the crossmark on Exhibit C on the car marked "Hopper bottom," where the pin-lifter now appears, the other pin-lifter would be on the opposite end of the car and on the opposite side of that end?

A. Yes, sir.

Q. If I understand you, both sides of the car are not equipped with pin-lifters?

A. Both sides, no, sir.

Q. This pin-lifter is connected with a pin that couples the car, as I understand you?

A. The pin-lifter is connected with the pin, yes, sir.

Q. When you lift the pin-lifter, that lifts the pin out from the coupler?

A. Yes, sir.

Q. Disconnects the car, or connects them, if you push it down?

A. Yes, sir.

18 Q. The connecting rod upon this car, was that gone, that is, that is what you mean by the pin-lifter, the connecting rod to a car?

A. Yes, sir.

Q. Did you notice the condition of the brake, the brackets upon this car where the pin-lifter or connecting rod should have gone to?

A. Yes, sir.

Q. Tell the jury the condition of those brackets as to being old or new?

A. The rod for this draw head of the car, on the draw-bar was an old break, and was rusty, and the one out on the outside end was a new break.

Q. These brackets which appeared upon the bar, serve what purpose?

A. To hold the pin-lifter.

Q. They kept the pin-lifter up against the end of the car?

A. Yes, sir.

Q. They were circular brackets, with bolts at each end, and those clasped around the rod, I presume?

A. Yes, sir.
Q. Then there was a play in the rod to allow it- movement to lift the pin?
A. Yes, sir.
Q. Those were both missing and broken?
A. They were broken off.
Q. One a new break and the other an old break?
A. One a new break and the other an old break.
Q. From your experience as a switchman I will ask you if that would interfere with the lever working at all, if there was not one there?
A. Yes, sir, it would.
Q. Tell the jury in what way?
19 A. Why, you couldn't pull the pin with it because it wouldn't work properly.
Q. By saying "not one there" I mean not one of the brackets, you understood that?
A. Yes.
Q. After your brother was injured did you go to the hospital with him?
A. No, sir, I went down to the depot, he was taken to the hospital from there.
Q. Did you see him that night at the hospital?
A. No.
Q. You have seen him quite often since the injury?
A. Yes, sir.
Q. You knew him well before his injury?
A. Yes, sir.
Q. You worked with him there in the yards?
A. Yes, sir.
Q. I wish you would state to the jury the general condition of his health and strength previous to the injury, as to being able-bodied or otherwise?
A. Why, he was healthy and strong, and slept well, and was an awful sound sleeper.

Mr. JANES: I move that the last be stricken out on the ground that it states a conclusion and not responsive.
COURT: Motion denied.

Q. With reference to his ability to do work in the yards I will ask you as to that, if you know?
A. Why, yes, he was capable, strong and healthy.

20 Cross-examination.

By Mr. JOHNSON:

Q. Mr. Otos, I don't recollect whether you stated what your age is?
A. I will be 24 next May, this coming May.
Q. You stated that at the time your brother sustained this accident you were about 500 feet away from where it took place?
A. Yes, sir.

Q. I believe you stated you were 500 feet up or down the lead?
A. Yes, sir.
Q. What do you mean by that?
A. Why, a lead is the main track where the switches are, and the other tracks branch off from this.
Q. Tnis track that you call the lead in the yard there at Willmar, runs, practically speaking, east and west doesn't it, I don't mean exactly but substantially?
A. Yes, sir.
Q. Now, which way was this switch-train moving at the time the accident occurred?
A. It was moving west.
Q. Towards the west?
A. Yes, sir.
Q. Was the engine at the west end of the cars or at the east end?
A. At the east end.
Q. And where were you from the train, east or west?
A. Why, I was east from the cars where he was switching, just about where the engine was?
21 Q. You were near where the engine was?
A. Yes, sir.
Q. And eastward?
A. Yes, sir.
Q. And what were you doing?
A. I was switching.
Q. Well, I mean what particular act or work were you engaged in at the time your attention was attracted to this?
A. Why, I was waiting to throw a switch in on another track, waiting for his train to get by.
Q. You were waiting for this train to get by so that you could throw the switch?
A. Yes, sir, and go over onto another track.
Q. How did you estimate the distance you were away?
A. Why, by the switch-stand, the way I did.
Q. By what?
A. What they call the switches, switch-stand.
Q. What side of the lead were you in, on the north or south side?
A. North side.
Q. Is that the side that the engineer is on?
A. Yes, sir.
Q. You say the first thing you noticed you heard him holler?
A. Yes, sir.
Q. Was this track, this lead, straight between where you were and where the accident occurred?
A. Yes, sir.
Q. How long did you wait before you started toward where he was, after you heard him holler?
A. Oh, might say five minutes.
Q. What were you doing those five minutes?
22 A. Why, nervous and surprised and shocked, I didn't know what to think about it.

Q. Then what did you do?
A. I started to run down where he was.
Q. Did you see him all the time during those five minutes?
A. Yes, sir.
Q. What did they do with him during those five minutes?
A. Why, he laid there, they didn't do nothing when he first rolled out; and then I ran down and got pretty near to the engine, and they were lifting him on the engine then.
Q. Some men ran down there?
A. Yes, the other two switchmen.
Q. Did you see them put him on the engine?
A. Yes, sir.
Q. Where was the engine at the time the accident took place, I mean the engine that they put him on?
A. Where was it?
Q. Yes.
A. It was on the engine that was switching.
Q. They used the switch-engine for that?
A. Yes, sir, the engine he had.
Q. You weren't down to the place where he was at the time they put him on the engine?
A. No, I didn't get quite there.
Q. Was the engine started off with him by the time you got there?
A. No, sir.
Q. The engine was still there?
A. Yes, sir.
23 Q. How long did the engine stay there after you got there?
A. Why, I started down and got pretty near there, and I saw them helping him on and I went up towards where I was working and lined the switch for the main line, I couldn't say just how long it stood there.
Q. Where did they go, with the engine?
A. On to the main track and then down to the depot, to take him to the hospital.
Q. You went down to the depot?
A. Yes, sir, on another engine.
Q. At this time did you know what was the matter with your brother?
A. Yes, sir.
Q. What had happened?
A. Yes, sir.
Q. And did you know how serious it was?
A. Yes, sir.
Q. How did you know that?
A. Why, I could see it.
Q. Where did you see your brother then, when he was on the engine?
A. Yes, sir.
Q. And after they took him down to the depot where did you go?
A. Why, I went over to tell my father.
Q. Where was he?
A. In his barber-shop.

Q. Where did you go then?
A. Why, I staid around a few minutes and then I went up to the east end of the yard and looked over the car.
Q. To look at the cars?
24 A. Yes, sir, at the car, that car.
Q. This particular car?
A. Yes, sir.
Q. And did you find it?
A. Yes, sir.
Q. How did you know that was the car?
A. Why, it was blood and flesh all over it, and the yardmaster was there, and he also showed it to me.
Q. You are not married?
A. Yes, sir.
Q. How long have you been married?
A. Since October.
Q. Since last October?
A. Yes, sir.
Q. How long since your brother was married?
A. It is a year ago last June.
Q. Where did he reside before he was married?
A. At Willmar, at home.
Q. With your parents?
A. Yes, sir.
Q. Is that where he resided also?
A. Yes, sir.
Q. All the time?
A. Why, until he was married.
Q. Yes, I mean before he was married?
A. Yes, sir.
Q. Always resided there with his folks?
A. Yes, sir.
Q. Have you ever lived in any other place than in Willmar?
A. No, sir.
Q. Did your brother ever live in any other place than in Willmar?
25 A. No, sir.
Q. This track that you call the lead, that is a switch-track, as I understand it?
A. Why, used for all purposes.
Q. Yes, I understand, but it is a track with several other tracks leading off from it?
A. Yes, sir.
Q. So that you use that sort of to go back and forth, and shove the cars on the particular tracks that you want them to go?
A. Yes, sir.
Q. And that is what that track is used for?
A. Yes, sir, that lead.
Q. What was being done with this train at the time the injury occurred?

A. Why, switching the cars onto the right tracks for their destination, as far as I know.
Q. How long had you been switching with this train?
A. I wasn't on that train at all.
Q. You was turning the switch for another train?
A. I was with another train.
Q. Then it was not his engine that you were switching for?
A. No, sir.
Q. Do you know how long that he had been switching with this train at the time this accident occurred?
A. No, sir, I do not.
Q. When did you first notice that train there at that time?
A. Why, when we came from the ice-house and went
26 down there, and he was on the lead then with his train.
Q. How long was this before the accident occurred?
A. Well, we were there only—you might say 5-10 minutes.
Q. And that was all the time that you saw and observed that train before the accident occurred?
A. Yes, sir.
Q. But they were there when you got there?
A. They were switching when we came.
Q. You don't know how long they had been there?
A. No, sir.
Q. Did you see car 125896?
A. Yes, sir.
Q. On the day of the accident?
A. Yes, sir.
Q. You saw this photograph Exhibit C, Mr. Otos?
A. Yes, sir.
Q. The picture of that car?
A. Yes, sir.
Q. Were you present when that was taken?
A. No, sir.
Q. You saw this car, though, the same day, did you?
A. Yes, sir.
Q. Did you notice that spot there, towards the end of the car, a white square, or rather oblong?
A. No, sir, I did not.
Q. You didn't notice that on the car when you saw it?
A. No, sir.
27 Q. Did you look at the car very carefully or did you just look at the brake?
A. I looked at it carefully, the whole car itself.
Q. I call your attention to these chalk-marks here?
A. Yes, sir.
Q. Have you seen a chalk-mark like that on cars?
A. Yes, sir.
Q. Could you tell us what those signify? or are?

Mr. DAVIS: Objected to as incompetent, irrelevant, immaterial,

and ask that he put in writing what he proposes and what such cross-examination is for.

Mr. JOHNSON: I think with different cards on the cars we have a right to ask the witness what the marks are.

Mr. DAVIS: May it please the court, this photograph was not taken on the day of the injury and these marks may have been put there later on.

COURT: Objection sustained. Exception by defendant.

Q. Do you know your brother's handwriting?

A. Yes, sir.

Q. Can you tell whether or not that is his handwriting, the chalk marks?

A. That isn't his writing,—no, sir, it isn't his writing. (On Exhibit C.)

Q. Do you know, as a switchman, how you learn or determine what tracks to put the cars on when you are switching?

A. The yardmaster gives us a list in the morning, a line up of the yard, and as the trains come in, they have a list showing
28 the initials, car numbers and the commodity and the destination, and that is what we are switching by.

Q. And the switchman goes by that card?

A. Yes, sir, that is the switch-list.

Q. Does the switch foreman mark the cars in chalk to indicate what track the car is going on?

Mr. DAVIS: Objected to as not proper cross-examination.

COURT: It will go somewhat toward his qualification and his knowledge of the railroad business,—that branch of it. Overruled.

A. Why, sometimes they mark and sometimes they don't, the destination.

Q. At that time it was customary at Willmar, wasn't it, in the yards there, to mark them at that time?

Mr. DAVIS: Objected to as not proper cross-examination.

COURT: Objection sustained.

Q. During the time that you worked there?

A. Why some——

Q. You may state if you can, calling your attention to this circle and the figure that appears to be 9 down here in the extreme corner, or corner of the car, I will ask you whether as a switchman you know what that means on the car (indicating on Exhibit C)?

Mr. DAVIS: Answer by yes or no please.

A. Yes.

Q. You may state what it means.

Mr. DAVIS: Objected to as incompetent, irrelevant, immaterial, no foundation laid, the witness not having testified that it was on there at the time he examined the car.

29 Mr. JANES: As showing qualification.

COURT: Objection sustained. Exception by defendant.

Q. There is what we call a draw-bar at each end of a freight car, isn't there?

A. Yes, sir.

Q. By the draw-bar you mean that heavy iron through which the pin is put, and there is a clevis that holds the cars together?

A. Yes, sir.

Q. And between each car then as they are connected, there is one on each of those cars?

A. One connecting-rod or pin-lifter?

Q. There is one of those draw-bars and a pin, you say, a pin goes on each of those cars?

A. Yes, sir.

Q. On the ends as they are together?

A. Yes.

Q. Then on this car there are two pins by which you can separate those cars, isn't there?

A. One on each end.

Q. But I mean you can separate, you can pull up the pin that goes through one draw-bar or you can pull up the pin that goes through the other, can you?

A. Yes.

Q. So that you can disconnect the cars either way, by pulling either pin?

A. Yes, sir.

Q. Now, here are two cars on Exhibit C, here is a pin-lifter on the end of this car, on the end of the car with the letters "Hopper bottom," and there is a pin——

Mr. JANES: Show that to the jury, Mr. Johnson, they
30 don't understand what you mean by that.

Q. There is a pin-lifter here at the end of this car marked "Hopper bottom," with which you could lift the pin through the draw-bar of that car?

A. Yes, sir.

Q. On the opposite side of this car where the letters Gre. are, there is another pin-lifter by which you could lift the pin in the end of that car?

A. Yes, when it is in proper working order.

Q. By either method you could separate those cars?

A. By either pin-lifter, yes, sir, if they were there and in working condition.

Q. You don't mean to say that it is necessary to step between the cars of a moving train to lift those pins do you?

A. Why if the pin-lifter is there you don't have to, no.

Q. Well, anyway, if the pin-lifter is gone?

A. Why yes, they would have to step in there.

Q. You can stop the train can't you? You could stop the train, couldn't you and go in there and disconnect?

A. I suppose you could, yes.

Redirect examination.

By Mr. DAVIS:

Q. How long would you hold your job if you stopped those trains to go in there?

A. About a minute.

Mr. DAVIS: Question withdrawn.

Q. Mr. Otos, those tracks,—these tracks upon which Mr.
31 Johnson questioned you, on which these cars were, they are known as what kind of tracks in the yards at Willmar, the tracks where those cars was?

A. They are called sorting tracks.

Q. How long had you been switching in those yards previously to this injury?

A. Three years.

Q. I will ask you if you know whether these tracks are used for different purposes at different times, that is, for different loads?

A. Yes, sir.

Q. And the track upon which your brother was working was used for different purposes during that time and for different loads?

A. Yes, sir.

Q. In other words as I understand it, one day it might be used for a Duluth load?

A. Yes.

Q. Another day for a Sioux City load?

A. Yes.

Q. Another day for a Minneapolis load?

A. Yes, sir.

Q. And another day for the far west or to the coast?

A. Yes, sir.

Q. Cars containing commodities for points to the far West, Sioux City, Duluth or Minneapolis would be used,—these tracks would be used indiscriminately for the purpose of running them on there?

A. Yes.

Mr. JANES: I will admit, I think I did admit that.

32 Recross-examination.

By Mr. JOHNSON:

Q. One of those sorting-tracks, as you call them, was a repair track or "bad-order track," as you call it, was it not?

A. Why, they have no special bad-order track out in the yard.

Q. What track were they using for bad-order or repair track that day?

A. Why, I don't know, I wasn't in the train yard at all.

Q. They would always have a track for that purpose, would they not, when they had cars that needed repair, that were out of repair and needed it, they would have a track then for that work to put those cars on to be repaired?

Mr. DAVIS: I wish to object to it as incompetent, irrelevant, immaterial and not proper cross-examination.

COURT: It is not proper cross-examination, but I will permit the question to be answered, however.

Mr. DAVIS: The evident purpose of counsel's question is to seek to establish by cross-examination that a repair track was used, and perhaps that this car in question was to go to the repair track. That is immaterial as I view the law.

COURT: I think he may answer the question if he knows, if he can.

(Question read.)

Q. And I will add to it,—And wasn't that referred to and spoken of as the "bad-order track"?

A. Do you mean where the repair-track was?

Q. No, I am asking you whether or not they didn't have one of these sorting tracks, or didn't use one of those that you
33 refer to as a class of sorting-tracks, to put cars out of repair on, whenever there were any, for the purpose of repairing them, and wasn't that track when so used, referred to and known as a repair-track?

Mr. DAVIS: Objected to as not proper cross-examination, as incompetent, irrelevant and immaterial.

COURT: Objection sustained. Exception by defendant.

Q. Did you have or was there a track in the yards there that day which was used as a repair-track, or bad-order track?

Mr. DAVIS: Objected to as not proper cross-examination, incompetent, irrelevant and immaterial.

COURT: Objection sustained.

Mr. JOHNSON: May it please the court, counsel went into what these various tracks were used for, that they were using different tracks, and different cars over different tracks.

COURT: I will let the ruling stand. Exception.

PETER NEWBERG was called as a witness in behalf of the plaintiff, and duly sworn.

Direct examination.

By Mr. DAVIS:

Q. What is your name?

A. Peter Newberg.

Q. How old are you?

A. I will be 19 the first of June.

Q. Where do you live?

34 A. I live at Willmar.

Q. What work are you now engaged in?

A. Why, I ain't been doing nothing lately.

Q. What work have you done, have you ever had any railroad work?

A. Why, yes, I worked for them at the roundhouse and at the machinist's office.

Q. What railroad?

A. Great Northern.

Q. Did you ever work also for the Soo?

A. Why, yes, I worked for the Soo when I quit the Great Northern.

Q. You were working for the Soo last April when this case was tried in Minneapolis?

A. Yes, sir.

Q. You were acquainted at that time with the plaintiff?

A. Yes, sir.

Q. Were you there in Willmar in the yards the day he was injured?

A. Yes, sir.

Q. Right there at the time he was injured?

A. Yes, sir.

Q. Did you notice the place where his foot was caught in the rails?

A. Yes, sir.

Q. Did you see the shoe in that guard-rail?

A. Yes, sir.

Q. I hand you Exhibit F (shown witness), you may state whether or not that is the shoe you saw in the rails?

A. Yes, sir.

Mr. JANES: Objected to as leading, and the exhibit appears to be in several parts, and the witness hasn't testified that he
35 saw all those parts in between the guard-rail, and I think the question is leading for that reason,—assuming that all those parts were in between the guard-rail.

COURT: You may ask the question in a different form, and avoid that.

Q. I will ask you to state if you know what this is, Exhibit F?

A. That is the shoe.

Q. What is it, tell the jury?

A. Why, it is the shoe that Harry Otos had on his foot at the time he was hurt.

Q. Did you see that shoe in the guard-rail?

A. Yes, sir.

Mr. JANES: Same objection,—objected to as leading and move it be struck out.

COURT: Overruled.

Q. Describe the condition of that shoe when you saw it there between the rails?

Mr. JANES: Objected to as assuming a state of facts not in evidence and as leading.

No ruling.

Q. Where did you first see this shoe?

A. I first seen the shoe in between the main rail and guard-rail,

with his foot in it, the heel was about an inch or two up above the guard-rail and the main rail.

Q. Describe to the jury the position in which you found this shoe and the foot, tell the jury.

A. The position I found that shoe—the toes was bent over, pretty near touched the heel; the whole foot was down in between the guard rail, and all you could see was the heel and a part of his foot, the rest was way down.

Q. The rest of what?

36 A. The rest of the leg was away down underneath the bolt.

Q. Under what?

A. Under that bolt that goes through the guard-rail and main rail.

Q. The rest of his foot?

A. Yes, sir.

Q. I will ask you if you helped to take that shoe out?

A. Yes, sir.

Q. You may state whether there was any blood on the shoe, or flesh there, around there?

A. No, sir.

Q. Did you observe any blood or flesh on the guard-rail?

A. Yes, sir.

Q. As I understand you, this shoe was between the main rail and the guard-rail?

A. Yes, sir.

Mr. JANES: Objected to as leading.

COURT: Objection sustained and the answer struck out.

Q. How much of the leg was in there at the time you saw this shoe there?

Mr. JANES: Objected to as assuming a fact not proven.

COURT: Objection overruled.

Q. How much of the leg was in there at the time you saw it?

A. Why the whole thing was in except the heel of the shoe was sticking up on top.

Q. What did you do with the foot and shoe after you found it?

A. Why I started taking the shoe—, I took hold of the

37 heel and the shoe came off, I threw the shoe on the side and started taking the foot out. The foot was half way out then, there was Peter Olson he came over and his crew came over, and the car-knocker came over afterwards, and he helped to take it out, and there was a Greek there.

Q. I wish you would state what occurred after that, and if any one came there, and what was done with reference to that shoe and leg and foot, tell the jury?

A. Why I started taking the leg off. I wasn't there about two minutes before Peter Olson came over, and then there is a Greek he could talk English pretty fair, he is supposed to be a foreman, and he came over and started to help me, and then we all three tugged down there together.

Q. Mr. Otos—I will ask you to state to the jury whether or not he had been taken away before you got there or did they take him away after you got there?

A. Yes, sir, he just came by; I came through the main line, and he was about 10 feet ahead of me, they had him on a switch engine, just going by when I came over.

Cross-examination.

By Mr. JOHNSON:

Q. This Exhibit F, the shoe, appears to be in several portions or parts; when you got to where the accident occurred what part of the foot did you see, could you see?

A. Why, I could see the shoe, and about up to here (indicating).

38 Q. Could you see the heel?

A. Yes, sir.

Q. The heel sticking up on his shoe, I mean the heel of the foot?

A. No, sir.

Q. You didn't see that?

A. No, sir.

Q. And where were these parts, now; this is the sides of the shoe?

A. Yes, sir.

Q. Where were those parts, where did you see them?

A. They was on both sides of the foot, in between the rails.

Q. On both sides of the foot between the rails?

A. Yes.

Q. This part here which is the sole, and the heel, was where?

A. It was sticking up like this (indicating).

Q. Where was it?

A. Why, it was in between the main rail and the guard-rail.

Q. In between the main rail and the guard-rail?

A. Yes, sir.

Q. Just show us just what position that was in?

A. It was just like this (indicating).

Q. Well now, where is the guard-rail and where is the main rail?

A. Well, the guard-rail is on this side and the main rail is on this side (indicating on model of rails on floor of court-room), his foot going down,—we didn't take hold of that,—and the whole thing came right off, and I throwed it on the side.

39 Q. How far is it between the main rail and the guard-rail where that shoe was?

A. You mean how many inches?

Q. Yes.

A. Why I don't know exactly.

Q. But this is the way is was?

A. Yes, sir.

Q. How far up did that heel stick out, up above the rails?

A. Why I should think about an inch and a half from the main-rail and guard-rail, sticking up.

(Rail model exhibited before the jury.)

Q. Is that substantially a correct reproduction of that main-rail and guard-rail?

A. Yes, sir, where the accident took place.

Q. Will you show us at what point on this guard-rail you found that shoe?

A. There was no blocking here (indicating on model).

Mr. JANES: I ask to have the answer stricken out as not responsive.

COURT: It may be struck out.

Q. Just point to the place.

A. Right here (indicating).

Model was marked (in the record only) defendant's Exhibit 1.

Mr. JANES: Witness indicates point by red cross where the shoe was caught.

Mr. DAVIS: Just show them.

Mr. JOHNSON: I am examining the witness now.

Mr. DAVIS: Well, he wanted to show the jury where it was.

Q. You mean now that this was nearer the east end of the guard-rail or nearer the west end where this occurred?

A. The east end.

Q. Where the shoe was, nearer the east end or west end?

A. Yes, sir, on the east end of this bolt.

Mr. JANES: The end of this exhibit near me is marked with the words "West end."

Q. You mean this is the east end?

A. No, this is the east end (indicating).

Q. So then, it is nearer the west end. Now, Mr. Newberg, you may put the shoe in just the way it was when you first saw it?

A. It seems to me this thing is closer than the other one; it was down like that (witness places shoe, Exhibit F, in between rails of model).

Q. Is that exactly the position that the shoe was in when you first saw it?

A. Yes, sir.

Q. All right, locate the rest of the shoe, put that in where that was?

(Witness indicates with the balance of the shoe, as to position.) That is the way it was, the foot.

Mr. JANES: The witness has placed the sole and heel of the shoe between the guard rail and the main rail near the red mark X on defendant's Exhibit 1, and also placed on each side of the heel and sole, the upper parts of the shoe.

Q. That heel is extending up there about two inches, is it not?

A. I should judge something like that.

Q. And that is the way it was then?

A. Yes, sir.

Q. Mr. Newberg, you testified in this case when it was
41 tried down in Minneapolis last summer, did you?
A. Yes, sir.
Q. Mr. Davis examined you at that trial?
A. Yes, sir.
Q. And at that trial when you was on the stand as a witness, did Mr. Davis ask you this question: "How much of the leg was in there at that time?"
A. Do you mean how much of the leg?
Q. Did he ask you that question?
A. Yes, sir.
Q. And did you not reply to that: "All of it except the heel, the heel was about two inches away," did you so answer to that question?
A. You mean the heel was two inches from——?
Q. Did you give that answer, did you answer the question that you say he asked you: "All of it except the heel, the heel was about two inches away?"
A. Yes, sir.
Q. Did he then ask you while you were on the stand as a witness, "the heel was cut off and lay somewhere away from the shoe?"
A. Yes, sir.
Q. Did you in answer to that question say, "Yes, sir?"
A. Yes, sir.
Q. Now, Mr. Newberg, where were you when your attention was first attracted to the accident?
A. Why, I was on duty at the round-house at that time.
Q. How far was that from the point of the accident?
A. Why, I should judge a block, or, I mean, half a block
42 or little more, straight north from there.
Q. About how many feet?
A. Why, I don't know just exactly how many feet, I should judge half a block.
Q. Two or three times as far as across the street would you say?
A. Yes, sir.
Q. What first attracted you, what occurred?
A. Why, a switchman who came over there and he telephoned the doctor, he says Harry Otos has got his leg cut off.
Q. And that is where you got your first information?
A. Yes, sir.
Q. Then what did you do?
A. I went over there.
Q. You went over there?
A. Yes, sir.
Q. To the place?
A. Yes, sir.
Q. Where the accident occurred?
A. Yes, sir.
Q. By the way, do you know what guard-rail that was, how do you refer to that guard-rail in the switch at Willmar, by number?
A. Why, I don't know.

Q. When you got out of the round-house could you see the place where the leg was?
A. No, sir.
Q. How far did you have to go before you could see the place?
A. Why, you have got to go through the repair-track first,
43 until you come to the main line, then I seen the switch-engine, and Harry Otos sitting on the pilot; he turned around and looked at——
Q. I didn't ask you that. I was asking you about seeing the place where the shoe was, but you say the repair-track was between the round-house and the point of the accident?
A. Yes, you have got to go through that before you came to the switch-tracks.
Q. You have got to go through the repair-tracks?
A. Yes, you have got to go across that.
Q. Going from the round-house to——?
A. To the switch-tracks.
Q. You mean you have got to cross it?
A. Yes, sir.
Q. Just tell us as nearly as you can where the repair-track is in relation to the place where the accident occurred and the round-house?

Mr. DAVIS: Objected to as not proper cross-examination, and incompetent, irrelevant and immaterial.
COURT: I think it is immaterial and not proper cross-examination. Objection sustained.

Q. How close did you get to the place of the accident before you saw—before you could see the leg?
A. Well, I don't believe I was over 4 or 5 feet.
Q. You couldn't see it until you were right upon it?
A. Yes, sir.
Q. Now when you got there, who was there?
A. Nobody.
Q. Nobody?
A. No, sir.
44 Q. How long were you there before anybody got there?
A. Why, there was another machinist helped me, Asa Osmundson, he came about 10 or 15 feet behind me.
Q. And then who came?
A. Why, there is a Greek, that foreman, came.
Q. How long was that after Osmundson came?
A. Why, I don't just exactly remember.
Q. How long after you got there was it he came?
A. Why, he was right behind me.
Q. Right with you?
A. Well, he was about 10 feet behind me.
Q. Then who came?
A. The Greek foreman.
Q. He was the one you were speaking about, wasn't he?
A. Yes, sir.

Q. Then who came?
A. No, Asa Osmundson ain't no Greek.
Q. So Osmundson and the Greek foreman were there with you?
A. Yes, sir.
Q. Who came next after that?
A. It is Peter Olson, section foreman.
Q. How long was that after you got there?
A. Why, I don't remember how many minutes it was, it wasn't very long.
Q. Give us your best judgment of about?
A. Oh, about two or three minutes.
Q. It may have been less than that?
A. How?
Q. It may have been less or more?
A. Yes.
45 Q. What did you do, if anything, before Mr. Olson came?
A. Why, I took hold of the shoe, taking the shoe off.
Q. Who did?
A. I did.
Q. What did the other two do?
A. Why, I had the leg half way out, the toes, I had hold of the toes, and the other two started to help me.
Q. Did you have the shoe out before Olson came?
A. Yes, sir.
Q. Had it all out when he got there?
A. Yes, sir.
Q. What did you do with it?
A. I threw the shoe on the side of the track.
Q. Which side?
A. On the north side.
Q. How far from the track did you throw it?
A. I should judge about 4 or 5 feet.
Q. Four or five feet?
A. Yes, sir.
Q. What did you do with the rest of it?
A. The shoe?
Q. No, the leg?
A. Well, it was half way out then, I took it out and Peter Olson got it and took it up to the hospital, and then that is all I know of it and I went back.
Q. Tell us how much of it you had out when Peter Olson got there?
A. Well, the toes was up about 4 or 5 inches, I was pulling on it, it was pretty tight in there.
46 Q. And where was the leg?
A. The leg was in the guard-rail.
Q. By throwing the shoe you mean the heel and sole there, or did you mean the whole thing?
A. No, the whole shoe.
Q. The whole shoe?
A. Oh, the whole shoe, sure.

Q. Could you get that shoe off from the *shoe* before you could get the foot out?

A. Yes.

Q. Where was the foot exactly with relation to this point where the red cross is on defendant's Exhibit 1?

A. The main bone of his leg was in under that bolt.

Q. I don't mean that, I asked you about the foot, where was that with reference to the red cross?

A. Well, the foot was where I took the shoe off. I say, the foot was where I took the shoe off.

Q. You can locate it by inches, can't you?

A. Yes, sir.

Q. Where it was from the point where the red cross is on defendant's Exhibit 1?

Mr. DAVIS: It is all indicated, just measure it. That will be more certain than his guess; measure from the red cross to the shoe and you will have the record all right.

Q. About six or eight inches?

A. I don't think it was more than that.

COURT: Go down and look at it.

A. (Witness does so, on model.) Yes, about the length of that, about 10 inches.

Q. Which way from the point marked with the red cross,
47 east or west?

A. West.

Q. Which direction was it?

A. West.

Q. Then you have it now on the wrong side, do you?

A. No.

Q. If it was west of the red cross then it would be here, wouldn't it?

A. Well, it is east of this bolt.

Q. It is east of the point marked red cross?

A. Yes, sir.

Q. About 10 inches?

A. Yes, sir.

Q. Just show us,—did you say there was some blood on the rail, on the guard-rail?

A. Yes, sir.

Q. Just show us where that was?

A. It was blood and flesh all around here (indicating).

Mr. DAVIS: What do you mean by "all around here,"—where the cross appears?

A. All around here (indicating) by the cross, all around in here.

Q. How far have you just indicated?

A. Up to here and to here (indicating).

Q. Then you mean from three inches west of the point marked with a red cross,—well, describe, just tell us how many inches there

was you noticed blood east and west of the point marked with a red cross?

A. Why I should judge about 8 or 9 inches, I can't tell.

Q. Which way?

A. West.

48 Q. West from the cross?

A. Yes, sir.

Q. How many inches, if any, going east?

A. Over to here east, about 8.

Q. 8 inches on the east?

A. Yes, sir

Q. This was right around six o'clock, was it, that this occurred?

A. Yes, sir.

Q. There is a whistle down there that is called the six-o'clock whistle?

A. Yes, sir.

Q. Did you leave the roundhouse before the six o'clock whistle blew?

A. No, sir, we can't leave there until 6:30.

Q. Then do you mean to say that when you left to go over here to where this accident occurred, it was 6:30 o'clock?

A. No.

Q. That you got over there to that point?

A. I went out.

Q. Well, I know, but before or after the six o'clock whistle blew?

A. Before.

Q. How long before?

A. Why I should judge about 20-25 minutes.

Q. You are not sure about that?

A. No, I ain't sure about that.

Q. And you are not sure it was before either, are you?

A. Yes, I am sure that it was before.

Redirect examination.

By Mr. DAVIS:

49 Q. Mr. Newberg, I believe you started to state that at the point where the red cross appears on defendant's Exhibit 1, there was something missing, what was it?

A. Yes, sir.

Mr. JOHNSON: Objected to as not proper, redirect, and incompetent.

COURT: I presume it isn't strictly redirect, I presume it was omitted. I will allow counsel to examine.

Q. State what was missing at that point?

A. That blocking wasn't there, there was just the bolt.

Q. The blocking which appears between the guard rail and main rail at the point where the red cross appears upon Exhibit 1 was missing?

A. Was missing.

Q. And simply the bolt through the rail here?
A. Yes, sir.

Recess.

Mr. DAVIS: May it please the court, Dr. Scheldrup is here from Minneapolis, and it has been agreed by counsel that I may examine in direct Mr. Otos the plaintiff, and then call Mr. Scheldrup before the cross-examination, so that he may leave to-night.

HARRY W. OTOS, the plaintiff, was called as a witness in his own behalf and duly sworn:

Direct examination.

By Mr. DAVIS:

(Otos lying on cot, testifying.)

Q. You are the plaintiff in this case, Mr. Otos?
50 A. Yes, sir.
Q. How old are you?
A. 27 years old.
Q. When were you 27, Harry?
A. Last March.
Q. Where do you live?
A. Willmar, Minnesota.
Q. Mr. Otos, are you married?
A. Yes, sir, I am.
Q. When were you married?
A. June 16, 1912.
Q. You have one little child?
A. Yes, sir.
Q. Mr. Otos, how old is that little child?

Objected to as immaterial.
Mr. DAVIS: Question withdrawn.

Q. Mr. Otos, what employment were you engaged in previous to your injury on September 11, 1912?
A. Switchman for the Great Northern Railroad Company.
Q. How long had you been employed as a switchman in the yards at Willmar?
A. Since August, 1910.
Q. Previous to that time had you worked for it at any work?
A. Previous to 1910, then I had been employed as brakeman,—since July 13, 1907.
Q. Since July 13, 1907, up to the time you became switchman?
A. Yes, sir.
Q. Had you worked continuously for them during that time, Harry?
A. I had been, yes, sir, I had been working for the Great
51 Northern continuously.
Q. On the 11th day of September, 1912, were you doing switching operations in that yard?

A. Yes, sir, I was.
Q. And did you have occasion to switch car known as 125896, Great Northern car?
A. Yes, sir, I did.
Q. I will ask you, on the day in question if car 125896 was or was not connected with other cars?
A. Yes, it was connected with other cars.
Q. What other cars?
A. It was connected with a car of grain for Duluth.
Q. And this car 125896 was bound for Minneapolis? From Willow Lake?

Mr. JANES: That was stipulated, too.

A. Yes, it was.
Q. Mr. Otos, what were you doing with those cars at the time that you were hurt, tell the jury?
A. Why, we were switching them unto the different tracks, where they were to be placed to go out on the different divisions out of Willmar.
Q. A car bound for Duluth would go on the Duluth track, as I understand?
A. Yes.
Q. A car bound for Minneapolis upon the Minneapolis track?
A. Yes, sir.
Q. What were you doing at the time of the injury?
A. Why, I was trying to switch this car that was connected to this one that you speak of, to the Duluth track, a car of grain for Duluth.
52 Q. What did you do?
A. Well sir——
Q. What did you do when you were trying to switch those cars, what act did you perform?
A. Trying to uncouple them.
Q. Did you notice anything with reference to car 125896 as to its equipment, anything missing?
A. Yes, sir, the pin puller was gone.
Q. The pin-lifter?
A. Yes, the pin-lifter was gone.
Q. When you uncoupled this car 125896 from the Duluth car, as I understand?
A. Yes, sir.
Q. Did you proceed to uncouple them? Or try to?
A. I tried to uncouple them.
Q. Tell the jury what you did?
A. Why, I stepped in between to uncouple them.
Q. Tell the jury what you did?
A. Why, I stepped in between the cars to pull the pin, and my foot was caught in the guard-rail.
Q. Mr. Otos, this pin-lifter that has been on these cars, what purpose did it serve?

A. Why, it was used for to uncouple the cars.
Q. You say the pin-lifter was gone from this car 125896?
A. Yes, sir, it was.
Q. This pin-lifter consists of a rod extending out to the end of a box-car and connecting with a pin which couples the two cars, I understand?
A. It is on the end of the car, and it extends from the side over to the draw-bar, and here it is connected with what is called the pin.
Q. And you operate that by moving it and lifting the pin
53 in or out of the coupling?
A. Yes, by lifting up on it to uncouple the car.
Q. You heard the testimony of your brother relative to the position of the pin-lifter on these diagonal ends of the car?
A. Yes, sir.
Q. State if that — correct?
A. That is correct.
Q. I will ask you if there was any pin-lifter on this car that you were working on that was attached to the Duluth car, on the side that you were working on, was there any pin-lifter on at the time that you were working on it?
A. The car that I was trying to uncouple?
Q. Yes, 125896?
A. No, there was no pin-lifter on that.
Q. When you stepped in to lift the pin, there being no pin-lifter on that car, what occurred?
A. My foot was caught in the guard-rail.
Q. Tell the jury what you did then?
A. When I felt my foot was caught in the guard-rail I threw myself out from between the cars in order to save my life.
Q. And which foot, your left foot was it?
A. Why, yes, my left foot was caught in the guard-rail.
Q. When it was caught in between the guard-rail, what started to go over your foot?
A. The wheel.
Q. When that occurred, I understand, you threw yourself out?
A. Yes, sir.
Q. And did you fall to the ground?
A. Why, yes, I fell to the ground.
54 Q. Full length?
A. Yes, sir.
Q. Your foot was caught behind there, between the—Where was your foot during the time that you threw yourself back and going to the ground, where was your foot?
A. In the guard-rail.
Q. What was happening to it?
A. Why the wheel, this car 125896 mashed it, and was mashing it.
Q. What became of your leg, you may state, whether it was pulled down in there or cut off,—tell the jury what happened?
A. My foot was caught in the guard-rail, I threw myself out, and

the wheel went up the leg and mashed it up to the knee, and tore my clothes and skin and the flesh away on the part from my knee up to my body.

Q. Up to your hip?

A. Yes, up to the hip.

Q. Groin?

A. Yes, sir.

Q. What caused your foot to be dragged down in towards the rail and broken off, do you know?

Mr. JAMES: Objected to as calling for the conclusion of the witness, he can state what took place.

Mr. DAVIS: I asked him if he knows.

COURT: He is asked if he knows.

WITNESS: What is the question?

(Question read.)

Q. Was it any part of the car?

Mr. JOHNSON: Answer yes or no.

Q. Do you know what a brake-beam is on a car?

55 A. Yes, I know what a brake-beam is.

Q. And did that touch your leg?

Objected to as leading.

Q. I will ask you to state whether or not the brake-beam touched your leg?

COURT: Objection overruled.

A. No, the brake-beam didn't.

Q. Tell the jury where the leg was broken off before you were taken to the hospital, what part of it was left in the rails there?

A. It seemed to me it was from the knee or over the knee down was left in the guard-rail.

Q. Left in the guard-rail?

A. Yes.

Q. And then from the knee up state its condition as to being torn or not?

A. Well, it looked to me as though the skin was torn off, off from the flesh, and I could see the bones sticking out of the end, and I could see the flesh.

Q. Was the bone sticking out at the end below the knee?

A. Yes.

Q. And then you were taken to the hospital?

A. Yes.

Q. And you were operated on there?

A. Yes.

Q. How long did you remain in the hospital?

A. I remained there 11 weeks.

Q. I will ask you to state how fast about that train was going as you stepped in to pull the pin?

A. The train was going about two-three miles an hour.

Q. I will ask you if you had occasion previously to perform similar work?

56 Mr. JANES: Just a minute——
Mr. DAVIS: Withdrawn.

Q. I hand you Exhibit F, and you may state if you recognize it, and what it is?

A. That is the shoe I had and wore the day I was hurt.

Q. That is the shoe that you wore on the day that your leg was broken off between the guard-rails?

A. Yes, sir.

Q. Mr. Otos, I will ask you to make it as nearly definite as you can about how far measured in inches below your knee, or the knee-joint, your leg was off before you were taken to the hospital, give the jury your best judgment?

A. Why, I don't know whether it was above the knee or below the knee, or where it was mashed.

Q. You don't know?

A. I wouldn't say for certain.

Q. You were taken from there to the hospital, I believe?

A. Yes, sir.

Q. Now, Mr. Otos, since you have been engaged there in the yards at Willmar, have you seen these pin-lifters repaired on the tracks where they were when the defect was found?

Mr. JANES: Objected to as there is no evidence to show where the defect was found, and as incompetent.

Mr. DAVIS: Question withdrawn, we will withdraw it if you don't want it.

Q. Do you know what the practicable way of repairing that defect would be?

Mr. JANES: Objected to as incompetent and imma-
57 terial.

COURT: I think it is.

Exception by plaintiff.

Q. At the times that you have had occasion to observe the manner and method of the Great Northern Railway Company in repairing defective pin-lifters, during that time have you had occasion to observe the manner and method of the Great Northern Railway Company in repairing defective pin-lifters such as they had on this car, answer by yes or no if you have observed how they repair them?

A. Yes.

Q. At different times, state how that was, whether they took them to the shops or not?

Mr. JANES: Objected to as immaterial and incompetent.

COURT: It seems to me it is absolutely immaterial, counsel, under the issues raised by the pleadings.

Q. Who took care of you at the hospital?

A. You mean what doctor?

Q. Yes.
A. Doctor Frost took care of me first.
Q. He was the Great Northern surgeon?
A. Yes, sir.
Q. How long did he care for you?
A. About a week.
Q. And then who took care of you?
A. Dr. Jacobs.
Q. And do you know what was done with you after you were taken to the hospital with reference to your leg, Harry?
A. Why, it was amputated near the hip-joint.
58 Q. You may state to the jury its condition as to the stump, as to whether or not there was any skin on it?
A. It was amputated near the hip-joint, there was no skin on it, and the skin had to be grafted on the stump.
Q. You know who amputated on the leg, what doctors were there?
A. I know of Doctor Frost and Doctor Johnson being there. I was told that Doctor Jacobs came later.
Q. At the time of the injury and during the 11 weeks you were in the hospital, you may state to the jury the nature and extent of the pain you suffered and endured during all that time?
A. It is impossible for me to describe the pain, it was so severe.
Q. Was very severe?
A. Yes, sir.
Q. And during that time as to your sleep, describe that to the jury, whether you were able to sleep at all or not?
A. I was able to sleep if the nurse would give me something to make me sleep.

Mr. DAVIS: Will you admit he didn't sleep?
Mr. JANES: Oh, during that 11 weeks of course, I presume he didn't.

Q. Mr. Otos, I will ask you to state to the jury the condition of that leg or stump with reference to any ulcers or sores on it, from the date of the injury to the present time?
A. The leg wasn't healed and didn't heal up until either the latter part of July or first part of August.
Q. 1913?
59 A. Yes, sir.
Q. And you were injured on September 11, 1912?
A. Yes, sir.
Q. Tell the jury the condition of it with reference to whether it maturated or not?
A. Why, it had to be changed with dressing on it twice a day, and the dressing would be full of matter.
Q. You may state to the jury whether or not you had at different times had to have a doctor amputate or cut into that leg?
A. Yes, I had Dr. Scheldrup cut into it once.
Q. And do you know what they cut into it for?

Mr. JANES: Objected to on the ground the witness is not qualified to testify and calling for a conclusion.

COURT: I think he ought to have an idea. Objection overruled.

Q. Do you know what they cut into it for?
A. Why, Dr. Scheldrup was——

Mr. JANES: Say yes or no.

Q. Do you know what they cut into it for?
A. Yes, I know.
Q. Tell the jury why?
A. Why, it felt soft and flabby under there, it felt as though there was something underneath; the doctor said there was pus.
Q. Don't state what was said, counsel don't want what was said, just what was did. Now, Harry, I will ask you with reference to this stump, whether now it causes you any pain?
A. All the time it——
60 Q. Describe to the jury how it aches, just tell the jury?
A. Why, it aches very nearly all the time, I feel sore and tender.
Q. It aches nearly all the time?
A. Yes.
Q. I will ask you to state to the jury whether or not you ever have any difficulty in controlling its movements?
A. I can't control it.
Q. You can't control it,—tell the jury what occurs, how that affects you? Tell the jury, they want to understand that?
A. Why, nights when I am lying down, all at once I will start up with a sudden jerk, and this comes on very suddenly you know, causing me a lot of pain.
Q. Are you able to control that at all?
A. Why, no, I can't stop it.
Q. How much of that stump is left if any, that is, what part of the leg, is there any part of the leg there except a part of the joint or butt where it hooks on to it?
A. There is no stump at all.
Q. Mr. Otos, did you have a doctor attend you previously to your trial in Minneapolis?
A. Yes, sir, I did.
Q. What doctor was that?
A. Dr. Scheldrup.
Q. I will ask you to state to the jury whether or not you were taken to the hospital during that time for an operation?
A. I was taken to the Swedish Hospital for an operation.
61 Q. You were operated on there by Doctors Scheldrup and Dunsmoor?
A. Yes, sir.
Q. I will ask you if after the trial in Federal Court in Minneapolis whether the leg ever caused you trouble with pus?
A. That didn't heal up until the latter part of July or the first part of August.
Q. The nature of this pus that ran out of your leg, describe it as to its color?
A. Well, kind of yellowish and looked kind of bloody.

Q. I will ask you this: How has it affected you in your sleep since this injury?

A. I haven't had a good night's rest since I was injured.

Q. Tell the jury in what way, and how you was affected?

A. When I go to lie down, and lying down, I dream, and probably dream about the accident and about getting my leg caught, and trying to get away, and wake up with a start and feel for my leg,—can't sleep, get restless and unable to sleep.

Q. Well, I will ask you if since this accident you have tried a crutch?

A. Yes, sir, I have tried to use crutches.

Q. Tell the jury with what result and what occurred?

A. My wife would help me up and try to help me, and I fell down a couple of times, I fell on my stump and bruised it and had to lay down, I couldn't stand it.

Q. You may state to the jury whether since this injury
62 you have been able to use crutches at all to get about?

A. No, I couldn't walk for any distance. I could probably walk the length of the bed, and then I would have to lay down again.

Q. Now, with reference to your health before the accident, you may state what your condition was?

A. Why, I was always in good health, and able to work.

Q. I will ask you if previous to that time you were able—you are married?

A. Yes, sir.

Q. I will ask you whether or not you were able to perform sexual intercourse with your wife?

A. Yes, sir, I was.

Q. I will ask you to state to them, to this jury, Mr. Otos, whether or not since that injury you have ever had any erection?

A. I have not.

Q. I will ask you to state to this jury whether or not since that time you have been able to have sexual intercourse with your wife?

A. No, sir, I have not.

Q. You are the father of the little child that your wife has here?

Objected to as immaterial.

Mr. DAVIS: As to the condition of him previously.

Objection overruled.

A. Yes, sir, I am.

Mr. DAVIS: The presumption is he is, and he is.

Q. Mr. Otos, previous to this injury will you please tell the jury what wages you were earning per month?

63 A. Why, I was paid—probably my average earnings probably from $105 to $115 per month.

Q. Did you work steadily every month?

A. Why, it depends on how business was.

Q. Well, what had you done for the last year previously, how many months had you worked?

A. Well, I could hold a regular job there and worked very nearly all the time.
Q. You did have a regular job?
A. Yes, sir.
Q. When you started to work for this company, what capacity did you start to work for them in?
A. I started as brakeman.
Q. You may state how long you worked as brakeman?
A. Why, I worked as brakeman until—I don't know when I was promoted to conductor, I think it was 1912 or 1911 when I was promoted to conductor.
Q. When you started going to work for this company tell the Jury what wages you were receiving at that time?
A. As brakeman?
Q. Yes, when you started out?
A. Well, that would depend on how much we worked.
Q. How much did you earn per month?
A. Oh, I couldn't say as to that.
Q. Did you earn as much as you did as switchman and conductor?
A. No.
Q. Your wages increased as your promotion increased?
A. Yes.
Q. You said you worked as a brakeman and you were
64 promoted to conductor?
A. Yes, sir.
Q. This switchman's job, are only conductors competent to hold it?
(No answer.)
Q. You may state, how long did you act as conductor?
A. I was working as a brakeman until I got a chance to go to work here in the yard, and it was while I was working as switchman that I was working as conductor.
Q. Did you work as a conductor?
A. Why, I made just two or three trips as conductor.
Q. The rest of the time you were working as a switchman?
A. Yes.
Q. I will ask you if the pain in your leg is more intense as to being in the evening or morning?

Objected to as leading. Objection overruled.

Q. If there is a difference?
A. It is always in the evening.
Q. What is the nature of your sleep now?
A. It is restless.
Q. After you wake up you may state to the jury whether you feel rested or otherwise?
A. No, I don't feel rested like I did before I was injured.
Q. I will ask you if since this injury you have suffered any pain to your back?
A. Yes, sir, I have.
Q. Describe it to the jury as to its intensity and its duration?

A. The pain is through the small of my back, it aches
65 all the time. I am unable to sit up for any length of time on account of it, I have to lie down to rest it.

Q. Since the injury you may state to the jury whether this pain has been continuous or not, up to the present time?

A. Yes, sir, it has.

Q. You may state to the jury the nature of that pain as to being severe or slight?

A. Sometimes it is, more severe in evening and night time than it is during the day.

Q. You may state to the jury what effect this plain in the back has as to your sitting up?

A. It makes me—I have to lie down, I am unable to sit up on that account.

Q. Why are you unable to sit up, tell the jury?

A. On account of the pain in my back.

Q. Pain being more intense sitting up than lying down?

A. Yes, sir, they are.

Q. Previous to your injury had you ever suffered any injury to your back, before that?

A. No, sir.

Q. Your health was good?

A. Yes, sir.

Q. Your appetite was good?

A. Yes, sir.

Q. I will ask you to state to this jury if since this injury you have had any difficulty in passing your water?

A. Yes, I have.

Q. State to the jury the nature of that, and when it occurs?

A. Why, in the night I wake up and my wife will get me
66 the urinal or bottle or what you call it, I feel as though I want to pass my water but nothing will come.

Q. Nothing will come?

A. No, sir.

Q. You may state to the jury whether or not that condition of affairs causes you any pain?

A. Sometimes it causes me pain, and sometimes a great deal of pain.

Q. Describe it and where that pain is with reference to your body?

A. It is down here in the cord.

Q. In the testicles, they call it?

A. Yes.

Q. Down in the groin, in the cord there?

A. Yes.

Q. I will ask you to state to the jury whether or not since this injury you have suffered any pain in the testicles?

A. Yes, I have.

Q. Describe to the jury the nature of that pain, its extent and so forth?

A. That is a kind of drawing-up pain, it isn't there all the time. It will itch for a while and then go away, and then come again.

Q. In working upon this pin-lifter or upon this car, if the pin-lifter had been there as it should have been, I will ask you how you would proceed to uncouple the car, and where you would stand with reference to the guard-rail and main rail as to being on the inside or outside?

A. I would have been outside of the main rail.

Q. You would stand outside of the main rail and lift the pin-lifter?

67 A. Yes, sir.

Q. In doing this do you step inside onto the guard-rail?

Objected to as leading. Objection sustained.

Mr. DAVIS: I offer in evidence Exhibits A, B, and C.

Mr. JANES: No objection to D, except it is understood that Exhibit D isn't to be taken as showing the distances between the guard-rail and the main rail, simply to show the general location of the guard-rail and the main rail.

Mr. DAVIS: The condition between the guard-rail and the main rail, of course it will show that.

Mr. JANES: Yes, the condition. Those are all right (indicating A, B and C).

Q. Mr. Otos, with reference to your condition, nervous condition after this injury, did you ever suffer from any nervous affection or trouble previous to this time?

A. No, sir, I have not.

Q. Since that time tell the jury how you have been affected as to being nervous or otherwise?

A. Why, I am nervous ever since I was injured.

N. H. SCHELDRUP was called as a witness on behalf of the plaintiff and duly sworn.

Direct examination.

By Mr. DAVIS:

Q. What is your name?

A. N. H. Scheldrup.

Q. Where do you live?

68 A. Minneapolis.

Q. How long have you lived there, doctor?

A. About eight years.

Q. Where did you live previous to that time?

A. Granite Falls.

Q. This city?

A. Yes, sir.

Q. You were practicing medicine in Granite Falls for some years?

A. Yes, sir.

Q. How long?

A. Since 1897.

Q. 1897 up to the time you left for Minneapolis?
A. Yes.
Q. You are a regularly licensed physician and surgeon?
A. Yes, sir.
Q. Have you had hospital experience?
A. I have.
Q. State to the jury the nature and extent of that hospital experience?
A. My work the last eight years has been exclusively hospital work, surgery mostly.
Q. And where?
A. In the city of Minneapolis.
Q. What hospital?
A. I am connected with the Swedish Hospital, the Norwegian Deaconess Hospital, St. Barnabas Hospital, the Northwestern Hospital, and St. Mary's Hospital.
Q. Have you been and are you now general surgeon for any railroad company?
A. I am not.

Objected to as immaterial. Objection overruled.

69 Q. Have you ever had any experience in your profession as a surgeon for a railroad company?
A. Yes.
Q. For what company?
A. For the Omaha and for the Northern Pacific.
Q. Where did you attend school and where did you get your training?
A. At Rush Medical College, at the University of Berlin, at Oxford, and at the University of France.
Q. At Paris, France?
A. Yes. Also in Chicago at the Post-graduate School.
Q. Doctor, you know Harry Otos?
A. Yes, sir.
Q. I believe you met him some time last April in Minneapolis?
A. I did, sir.
Q. And did you at that time examine his leg?

Mr. JANES: Objected to as leading; he can ask him about what took place.

COURT: Of course that is just preliminary, it can't do any harm.

A. I did examine him.
Q. You may state to the jury the condition you found that leg in when you first examined him, just state to the jury.
A. I found that he had a considerable swelling over the amputated stump, a redness and inflammation, and a lot of softness which indicated that he had some pus still in the stump. It was also very painful on touch, and it was very spasmodic, that is, if you touched the nerve it would go into spasms.

70 Q. What did you do for him after you examined him?
A. I took him to the hospital and opened the ab-cess and scraped it out, and put in drainage and dressed it.

Q. Did you also see the leg afterwards?
A. Yes, sir, I did.
Q. During the progress of the trial?
A. Yes.
Q. You may state what if anything you did towards treating the leg?
A. I simply dusted it with antiseptic powder, washed it out and changed the dressings so as to keep it clean and let the pus run out.
Q. Doctor, you may describe to the jury the condition of that stump as to its relative position on the leg, as to where the leg is taken off?
A. The amputation is practically at the hip joint, there is just enough muscle so as to cover a part of the joint.
Q. At the time you examined his leg there in Minneapolis, about how large were these spots on his leg, the ulcers?
A. About the size of a half dollar, probably a little larger.
Q. Where were those with reference to the stump?
A. About the center part of the stump.
Q. Will you please step down here and show the jury the size and extent and relative position of them?

Mr. JANES: I object to any disclosure of the stump, or the plaintiff's leg at this time, the doctor saw the condition and he can describe it.

71 COURT: I think, counsel, it will serve no useful purpose.

Mr. DAVIS: The courts have held it is proper.

COURT: And others have held that it would be a rather unsafe and improper exhibition.

Exception by plaintiff.

I understand that there is no objection to the doctor's locating, telling, explaining, just where those sores and troubles were.

Mr. JANES: Not at all.

Q. Could you do that better by the stump being exhibited, doctor?
A. Yes, I can.
Q. I now ask you to show them the stump?

Mr. JANES: Same objection made.
COURT: Objection sustained.

Q. Doctor, I will ask you to state whether or not,—I think you did state, that there was pain on pressure at the point of the stump?
A. Yes.
Q. You may state what that is indicative of?
A. Well, at that time there was a lot of pain due to inflammation, but I also discovered that he had the big nerve trunks squeezed in the scar.
Q. To what?
A. The big nerve trunks squeezed in the scar.
Q. That is the nerves were imbedded in the scar tissue?
A. Yes.
Q. Have you examined that leg recently?
A. I have.

Q. To-day?

A. I examined him this morning.

72 Q. State to the jury its condition as to the nerves and such things and what you found with reference to pain,—everything you found.

A. The wound has healed up, the two tumors are still there showing that the nerve is imbedded in the scar tissue, and it is painful upon pressure on those particular points, and whenever you press on it the muscles are thrown into spasm, and it quivers. He has pain on deep pressure but the skin itself don't seem to have very acute sensation; it is the deeper parts where he has the pain.

Q. I will ask you to state to the jury whether or not that scar tissue contracts?

A. It does contract.

Mr. JANES: Objected to as leading and suggestive.

COURT: It was leading, of course.

Q. Doctor, did you examine his leg with reference to ascertaining whether there had been any grafting on the leg?

A. There has been grafting on the leg.

Q. Describe to the jury the nature of the grafting, of the grafting operation, and what effect it has, and also its value as compared with natural or true skin?

Mr. JANES: We will admit that skin was grafted.

Mr. DAVIS: I am not asking that or asking you to admit anything; I am offering to show it by this witness.

A. Wherever we have an extensive raw surface it takes a long time for the skin to fill in and in a good many cases it will

73 not fill in, so the quickest and best way is to take the skin from another person or from another part of the body and placed upon this raw surface, and if the operation is done under aseptic precautions, that skin will stick and new blood vessels will shoot into it and make it heal; and then consequently, where the grafting has not been accomplished, or if there is parts that die out, it will be easier for nature to build up skin between the grafting. In this case there were several grafts put on, at least four if not more.

Q. This grafted skin with reference to its resistance, and true skin, which is the greater?

A. True skin is the best.

Q. How about the scar tissue that is there?

A. The scar tissue in this particular instance is quite extensive, on account of the suppuration that he had, on account of the pus formation and the running pus and infection, it has formed a very dense, hard tissue that keeps on contracting, and has contracted quite considerable.

Q. Compare that action of scar tissue with true skin.

A. Scar tissue is an entirely different formation; it is a knitting together of the fibers that forms a dense, hard mass instead of true skin, which is pliable and soft.

Q. Which has the more resistance, true skin or scar tissue?

A. True skin.

Q. Doctor, I will ask you to state from your examination of this man's leg, whether or not in your opinion it is impossible for this man to have an artificial limb?

A. He cannot.

74 Q. Tell the jury why not?

A. He has no stump to walk on. The tissues that are now imbedded in the scar are too extensive and can't bear any pressure on it, and the best that he can do is to have crutches. And furthermore, there would not be anything to anchor the artificial limb to.

Q. And as I understand it, doctor, there isn't any stem by which a purchase could be obtained?

A. No.

Q. Doctor Scheldrup, did you examine the leg again to-day?

A. I did.

Q. Tell the jury the condition you found it in with reference to ulcers, if any?

A. There is no ulcers to-day.

Q. Well, the condition of the nerves there?

A. The nerves are still squeezed in the scar tissue.

Q. I will ask you to state whether or not there is any evidence of nerve tumors?

A. There are, two tumors.

Q. Describe those to the jury.

A. There is a tumor on the upper part of the scar, and there is a small tumor in the middle of the scar.

Q. What effect as regards the patient or person suffering from such thing does it have upon the person?

A. That produces pain.

Q. Doctor Scheldrup, did you examine this man's back?

A. Yes.

75 Q. In April last?

A. Yes.

Q. And also at the present time?

A. I did.

Q. I wish you would describe to the jury the condition of this man's back as you found it last April?

A. He was very sensitive to pressure, if you ran your hand up and down the spine; he was sensitive all over the spine, but he was more sensitive in the lower part of the spine than he is in the upper part, and it seems like the pain is increased as you go down towards his back and the lower part of the spine, so that when you get down to what we call the sacrum there is where the most intense pain is on pressure.

Q. Now, doctor, the most intense pain you say is down in the sacrum?

A. Yes.

Q. Will you describe to the jury what the purpose the sacrum serves as to the body?

A. The sacrum is a part of the spinal bone, is that part that forms

the curve of the spine and forms the lowest fragment of the spine, except the coccyx, which is a little particle of bone. This sacrum has holes in it for the nerves to go through, and it also has what we call the sympathetic nervous plexus lying up against it on the inside.

Q. You may state what you found with reference to his back as to any injury being permanent or temporary.

A. I believe it is permanent.

Q. Are you reasonably certain of that fact, doctor?

76 A. I am from the examination I made this morning, there is no improvement as formerly.

Q. You made an examination this morning?

A. I did.

Q. You may state whether or not there is any improvement as compared with your examination last April?

A. He is exactly the same as he was when I first examined him as to pain over the spine.

Q. Over the sacrum?

A. Yes.

Q. And from the examination and your knowledge of medicine, you may state whether or not in your opinion the injury is permanent or temporary.

A. I believe from the history of the case——

Objected to as repetition.

(Question read.) The injury to his sacrum?

COURT: That is my recollection.

A. Yes, I did.

Q. Now doctor, what function do the sympathetic nerves serve to the body?

A. Well, they supply the impulses, the nervous impulses to the different cells of the body, or the different organs of the body.

Q. With reference to his testicles, did you examine them?

A. I did.

Q. And his penis?

A. Yes.

Q. And the pudic nerve, did you examine that?

A. Yes, I did.

Q. State to the jury the function of the pudic nerve?

77 A. The pudic nerve supplies—you mean relative to this particular organism, don't you?

Q. Yes.

A. It supplies the motor function, the active function, to the penis, to the body of the penis and the gland of the penis.

Q. Now, state to the jury the condition in which you found his pudic nerve?

A. Upon rectal examination I found that the nerve on both sides is very sore.

Q. What does that indicate?

A. It indicates that there is irritation.

Q. An irritation?
A. Yes.
Q. Are you able to state what the cause of it is?
A. No, I am not.
Q. Now, doctor, in reference to this condition as to his cord, I wish you would state that, the spermatic cord?
A. He has a scar running over on the left side, running into the hairy part of the pubes and across over the cord, or at least up to it.
Q. What effect, if any, does that condition which you found in his testicle, pudic nerve and spermatic cord, have upon his power of having sexual intercourse?

Mr. JANES: Objected to as incompetent, irrelevant, immaterial, and leading.
No ruling.

Q. I will ask you this, does it have any effect upon his power of having an erection, the condition which you found?
A. It does, a traumatic injury.
78 Q. Tell the jury what effect it has?
A. The effect upon a nerve that is either squeezed or inflamed or in any other way injured, is to cause paralysis to the part that it supplies.
Q. I will ask you to state whether or not you made any tests with reference to ascertaining the condition of Mr. Otos' sexual organs?
A. I did.
Q. Tell the jury for what purposes and the result?
A. I made a test for the purpose of ascertaining whether or not the nerve was capable of conveying impulses to the penis, and I found that the reflexes was gone, consequently the nerve isn't working.
Q. What does that indicate?
A. It indicates that the nerve impulse is abolished.
Q. And the result is what?
A. The result in this case is impotence.
Q. What kind of impotence?
A. He is unable to get an erection.
Q. Describe what other test you have made, if any, and how you did that?
A. I tested the reflexes, what we call the bulbar reflex, reflex of the bulb, and also the reflex of the cremasteric. Those are two reflexes to ascertain the functions of the nerve.
Q. From those tests what did you find?
A. I find that they are abolished, there are no reflexes.
Q. And that indicates impotence?
A. Yes.
Q. Doctor, assuming that this boy previous to his injury
79 had been in good health, the father of a child, married, and previous to that time had not suffered from impotence; that he was injured on September 11, 1912; that since that time he has not been able to have an erection and has had no sexual intercourse, and also taking into consideration the tests you made and the condition that you found, I will ask you to state whether or not in your

opinion this condition is permanent or temporary, as to being impotent?

Mr. JANES: Objected to as no sufficient foundation laid, and as incompetent.

COURT: Objection overruled. Exception by defendant.

(Question read.)

COURT: I don't want counsel to misunderstand me—I don't recollect the testimony with respect to the intercourse to be just as you have assumed in there.

Mr. JANES: Has this witness testified that the plaintiff was impotent?

WITNESS: Yes, sir.

COURT: It is just a difference of phrasing. Objection overruled.

Mr. JANES: Add to that objection that the opinion of the doctor would be too speculative and uncertain on which to base damages.

Question read. Question withdrawn.

Q. Doctor, assuming that in this case this boy sustained an injury such as he has testified to, and that thereafter an operation was had by which practically all of his left leg was taken away, and it existed for some time in the condition in which you found
80 it; assuming that during the injury his leg or foot was caught between the guard-rail and the main rail and that he threw himself and his body back, full length, and that since that time he has suffered extreme pain in the small of the back, continuously, the pain being greater at one time than another; and taking into consideration and assuming also that he is the father of a child, that he is married, and that previous to that time he had no trouble of any kind with regard to being impotent; that since that time he hasn't had any erection and hasn't had sexual intercourse since the injury, the injury having occurred September 11, 1912; also taking into consideration the tests you have made and the result of those tests, I will ask you to state whether or not you are able to state to this jury whether or not the man is impotent?

Mr. JANES: Same objection as to the last question, and on the further ground that it is too indefinite, no sufficient foundation laid on which to base damages.

COURT: Objection overruled.

Q. Are you able to state?

A. I think I can, yes.

Q. You may state whether or not he is impotent?

A. He is.

Same objection. Objection overruled. Exception.

Q. Are you able to state whether or not that condition is permanent or temporary?

Same objection. Objection overruled. Exception.

A. To the best of my opinion I believe it is permanent.

81 Q. You feel reasonably certain of that?

A. Yes.

Objected to as leading. Objection sustained.
WITNESS: May I state to the jury——
Mr. JANES: I move to strike the answer out.
COURT: Yes.

WITNESS: May I state to the jury upon what——
Q. Do you wish to state to the jury upon what you base your opinion?
A. Yes, I wish to state to the jury.

Mr. JOHNSON: Objected to as not a proper question for the reason that it is incompetent.
COURT: Objection overruled.

Q. You may do so.
A. I base my opinion upon this fact, as to the testimony that I have heard and upon my personal examination. The facts as I understand it is that he met with this injury and he had an injury to his back, and he had a tremendous shock, and there are very few men that recover from an injury of this kind. He has a lot of scar tissue and from the nerves imbedded in the scar tissue he has had considerable pain; his nervous condition has been run down, he is tissue and from the nerves imbedded in the scar tissues he has ahd ample time for repair of any nerve tissue that were injured, and if there was to be any erection, by nature repairing it, it would have shown some signs by this time. To the contrary, we find that the nerves are still inflamed, and that he still is in a state of low vitality, and upon those facts I base my opinion.

82 Q. Doctor, with reference to his nervous condition, does his nervous system have anything to do with affecting the question of impotence?

—. ——.

Q. Does the nervous system in any way or condition affect the question of impotence?
A. Yes, indeed it does.
Q. Tell the jury why?
A. A man who is suffering under a tremendous shock, or from the effect of a shock, has not got the vitality and hasn't got the stimulation, or the desire.
Q. Doctor, you stated that he was in a low state of vitality; I will ask you to describe how the condition of his vitality as you found it last April compares with how he is now, and state whether there is any difference?
A. There is some difference in this respect, that he does not run as much of a fever now as he did at that time, but he still is running some fever.
Q. He is still suffering from fever?
A. He is still suffering from fever, his heart action isn't as fast now as it was then, but it is still very fast, his pulse runs up to 110 and 115, and he is still very nervous and he still has a lot of pain.
Q. You may state to the jury whether or not the injury to the back would be in any way connected with the impotence.

Mr. JANES: Objected to as leading and no foundation laid.
COURT: Objection overruled. Exception.

A. I believe that the injury to his back plays a big factor in the impotence.
Q. Tell the jury why and in what way.
A. The traumatism to his sacrum is in the vicinity where the nerve originates from that supplies the stimulus to the penis.
83 Q. I will ask you to state to the jury from your examination last April as well as now, whether or not you found any sign of improvement with reference to his sexual organs at all?

Mr. JANES: Objected to as a repetition, and nothing to show that there was any examination made at that time.
COURT: Objection sustained.

Q. I will ask you if you made any examination also in April with reference to his sexual organs?
A. I did.
Q. You may state to the jury whether the conditions that you found in there were the same then as they are now?

Same objection. Objection overruled.

A. They were about the same as they are now.
Q. I will ask you to state to the jury from your examination in April and at this time, whether or not there has been any improvement in that condition?
A. To my belief there has not.
Q. I will ask you to state to the jury whether or not you are reasonably certain of the opinions you have expressed?

Mr. JANES: Objected to as leading and suggestive. It is a question for the jury isn't it, and not the witness, or court.
Mr. DAVIS: No, it is a matter of law.
COURT: Well, it is leading.
Mr. JOHNSON: And self-serving.
COURT: As to the question of counsel, of course if there is any harm as to its being leading, that harm has already been done, and couldn't be cured by asking the question in any other way.
84 Objection overruled.
(Question read) —as to his condition?

A. My opinion has been based upon personal examinations, and statements of facts that I have found, and I have rendered my opinion to the best of my ability upon the facts presented.

Mr. JOHNSON: I move that be stricken out as not responsive to the question.
COURT: Motion is granted; I think that is repetition, in substance, of his former testimony, and it isn't responsive, either.
(Question read.)

A. I am reasonably certain.

Cross-examination.

By Mr. JOHNSON:

Q. Have you ascertained, doctor, whether the plaintiff had lost anything in weight between the examination you made last April and now?
A. No, I did not ask him his weight.
Q. Is there any appearance that he has?
A. No, his weight is just about the same.
Q. As near as you can tell?
A. Yes.
Q. And his nutrition is normal and healthy?
A. No, his nutrition isn't normal nor is he healthy.
Q. As far as the difficulty with his sexual organs is concerned, the fact that he has been suffering from pain and nervousness consequent upon the shock and so forth, of course that would naturally tend to prevent him from sexual desire or sexual function, wouldn't it?
A. That is one of the causes.
85 Q. Well, it is a very serious one, is it not, an important one?
A. Yes, that is a very important one.
Q. When a man has suffered from a serious accident and has a great deal of pain, of course he naturally has no sexual desire?
A. That is usually the case, yes.
Q. Under the conditions this man has been in, in that way, you would not expect him to have had any sexual desire since the time of the accident, would you?
A. Yes, I would, and I will explain to you on what I base that opinion, if you please.

Mr. JOHNSON: I will ask for any information on that point later.
Mr. DAVIS: I will ask the court if the doctor can on cross examination state on what he bases and gives that opinion?
COURT: Counsel is cross-examining him.
Mr. DAVIS: Very well.

Q. Now as to the tenderness and soreness of his back, you ascertained that by passing your hand up and down?
A. Yes.
Q. The spine,—of course the only way you have of knowing is what he tells you when you pass your hand up and down the spine, I suppose?
A. No.
Q. You have to depend largely upon the information that he furnishes you?
A. Partly, and partly upon my own examination.
Q. Well, as to whether or not it is sore or tender you have
86 to depend almost wholly upon what he tells you, don't you?
A. I do not.

Redirect examination.

By Mr. DAVIS:

Q. Doctor, I will ask you this: You stated that you would expect to have sexual desire and started to state your reason, tell the jury your reason why you would?

A. If it is permissible I will: It is usually the case that the morning hour is when the bladder is full, and that is the time that the patient has the most erection, or most men have, and he made this testimony to-day——

Mr. JANES: I object to anything as to the testimony that he has made, as not proper.

No ruling.

A. As to pain, the question was as to pain.

Q. Go ahead, doctor.

A. He made this testimony as to pain, that the pain was not constant, that it came and went but harder in the evening.

Mr. JOHNSON: I object to the doctor saying what he said, it ought to be put into the question.

Mr. DAVIS: I am asking him on what he bases his opinion.

COURT: He has expressed his opinion on that quite fully, I think I will sustain the objection.

Q. Don't state the testimony, complete your answer if you can?

87 A. I don't know the legal way of getting around to answer this directly. I know what I want to say but don't know whether you will permit me to or not. What I had in mind was this, that in the morning there is usually with the normal man an erection, because the bladder fills up and it squeezes upon the prostate and vesicle and causes a congestion of the penis. If there is any impulse at all, that impulse will come in the morning, and this case has his pain in the evening most severely, and during the night, so if there was any impulse to that penis there ought to be an erection in the morning, even if it was only a slight erection.

Recross-examination.

By Mr. J[illegible]SON:

Q. Your conclusion then as to impotence is really based on the testimony of Mr. Otos?

A. My conclusion is based upon what I told the jury a little while ago, upon several facts, and upon the history——

Q. Answer my question, you have just stated, have you not, that you based it upon the testimony of Mr. Otos as to when he had his pain?

A. No, you misunderstand me, that was an entirely different question.

LOWELL E. JEPSON was called as a witness on behalf of the plaintiff and duly sworn.

Mr. JANES: We will admit that Mr. Jepson will testify that the condition of the stump is such that an artificial limb cannot be used and placed thereon, to save time.

88 Mr. DAVIS: I don't wish to save time, I wish to examine my own witness, if the Court please, in my own way.

Direct examination.

By Mr. DAVIS, as follows:

Q. What is your name?
A. Lowell E. Jepson.
Q. You live where?
A. Minneapolis.
Q. How long have you lived there?
A. 26 years.
Q. During that time have you held any official position?
A. Yes, I was state senator eight years.
Q. From a district in Minneapolis?
A. Yes.
Q. What business are you in?
A. Manufacturer of artificial limbs.
Q. How long have you been engaged in that business, Mr. Jepson?
A. 25 years.
Q. State to the jury what has been the extent of your experience and business in that line, how many limbs did you think you have fitted or taken care of?

Mr. JANES: We admit his qualifications.

Q. Proceed, answer my question.
A. Oh, I have fitted the last 25 years between 16 and 17,000.
Q. You examined the stump of Mr. Otos last April?
A. Yes, sir.

89 Q. And also to-day?
A. Yes.

Q. State to the jury the condition in which you found it?

Mr. JOHNSON: Objected to on the ground that it is immaterial in view of the admission made by counsel for defendant.

COURT: Objection overruled. You need not detail the conditions, but the conditions so far as it would relate to your line of work, as I understand it.

Q. Describe and state its condition with reference to your line of work and with reference to an artificial limb.

A. Well, the leg is amputated at the hip, disarticulate, unjointed at the hip, right in here (indicating).

Q. In your experience in furnishing artificial limbs, I will ask you if you have had occasion to observe the result of such limbs upon stumps that have grafted skin?

A. Yes, sir.

Q. What has been the invariable result?

Mr. JOHNSON: Objected to as immaterial, in view of our admission. It can't serve any purpose at all except for one very obvious purpose.

COURT: Well, I don't know, counsel, but what that admission is as broad as any evidence that could be material on that point.

Mr. DAVIS: Do I understand that counsel, by simply admitting, forecloses my right to make this witness explain the reason for his answer as to why it cannot be done?

COURT: There is no question.

90 Mr. DAVIS: Is it conceded by the defendant in this case that the witness Jepson will testify, and that it is a fact in the case, that the plaintiff can never have an artificial limb or cushion fitted to the stump in question, or any contrivance by which his leg can be used,—the stump can be used, to aid him in the power of locomotion? We expect to prove this.

Mr. JANES: That is admitted.

Adjournment until 9 a. m. next day.

H. W. OTOS recalled at this time.

Cross-examination.

By Mr. JOHNSON:

Q. Mr. Otos, how long did you say you had been working for this railroad company when the accident took place?

A. I had been employed there since July 13, 1907.

Q. How long had you been employed in the capacity that you were working in that day, at the time of the accident?

A. As switchman, I was employed there since August, 1910.

Q. Well, as switchman or as switch foreman, which is it?

A. I was working as foreman, I think it was September, 1910.

Q. You worked as switch foreman from September, 1910?

A. Yes, sir.

Q. And that is the capacity you were working in at the time of the accident?

A. Yes, it was.

91 Q. I don't want you to strain yourself but talk as loud as you can. What time did you get to work this morning?

A. I went to work at eight o'clock that morning.

Q. What was it your custom to do the first thing in the morning?

A. The first thing to do in the morning would be to report to the yard-master and get our work from him.

Q. How do you get your work from the yard-master?

A. Well, when we get to work he gives us a line-up that shows what is in the different tracks in the yards, and he gives us lists of the other things, of the other work.

Q. That is a written statement or list, is it, that you call a line-up?

A. Yes, it is for that date.

Q. And that is called your morning line-up, is that the way you refer to it?

A. Well, we just say "line-up" in the yards.

Q. That is the one you get in the morning?

A. Yes, sir.

Q. Now, on that line-up tracks are numbered and then it is indicated on the line-up what cars to put on the different tracks that day?

Mr. DAVIS: Objected to as not the best evidence.

COURT: Objection overruled. He isn't asking for any particular line-up.

A. Why, our line-up shows which track is clear, whether one track will be clear, and this one will be used for the Duluth track, and another one for the Minneapolis track, and probably one a
92 through Soo track, Sioux City station, and one the far West, while the others were clear, that is the way the line-up works.

Q. And that appears upon this line-up?

A. Yes.

Q. That is indicated on the line-up, I mean?

A. Yes.

Q. What particular purpose certain tracks are to be used for that day?

A. Yes, sir.

Q. And if there is a track designated for a bad-order track for that day, that is also indicated on the line-up, is it?

A. Yes, sir, it is.

Q. Now, this morning, the day of the accident, you reported as you have already testified to that it was your custom to do, did you?

A. Yes, sir, I did.

Q. And you got your morning line-up?

A. Yes, sir.

Q. And what did you do with that line-up?

A. Why, I looked it over to see what was on the tracks there. I don't know what became of the line up afterwards, I think I got it home now, I brought it to the hospital with me, I don't know what became of it, I seen it afterwards but I don't know whether it has been destroyed since or not.

Q. What track was designated as a bad-order track that day?

A. I don't remember.

Mr. DAVIS: Objected to as immaterial, incompetent, irrelevant and not proper cross-examination.

COURT: Let the answer stand; objection overruled.

93 Q. Well, there was a bad-order track, or there was a track designated for a bad-order track that day, was there not?

Mr. DAVIS: Objected to as not the best evidence, incompetent, irrelevant, immaterial, and not proper cross-examination.

COURT: Objection sustained.

Mr. JANES: Will the court object to giving on what ground you sustained it?

COURT: I think it is immaterial and not proper cross-examination, and I sustained it on that ground. I think it is inadmissible for those two reasons, and it might be inadmissible for the reason that it is not the best evidence. The courts have to avail themselves of the benefit of all the objections.

Q. Now, Mr. Otos, when a train comes in, for instance from Watertown, how do you know what to do with the different cars in that train?

A. Why, every train that comes in there is a list made up, the conductor makes up the switch-list, and this list shows the initials, the number, the contents and destination of each car, and the train men delivers that to the yardmaster, and the yardmaster delivers it to the switchmen.

Q. When you get the switch-list you already have your morning line-up?

A. Yes.

Q. And you see from the switch-list where the cars are going, and then you know what track to put each car on, is that it?

A. Yes, sir, that is it.

Q. And you received a switch-list similar to the one you
94 have described after this train came in? In which this car in question was, came in?

A. Yes, sir, I did.

Q. What is the first thing that it was your practice to do when you received the switch-list?

A. Why, finish up the work that we had then, and then we would take this switch-list and start switching the train according to the list.

Q. By finishing up the work you mean on any other train that you had not finished at the time this train comes?

A. Why, yes, unless some rush work or something like that,—then we drop everything then.

Q. Assuming that you have finished up such other work and got your switch-list, where do you go?

A. I go down and start switching this train, the list that is given us.

Q. You go down to the train that you are going to switch?

A. Yes, sir.

Q. What is the first thing you do about it?

A. Well, it depends on, if there is any air in the train that has just come in, if there is air in the cars, you have to bleed them, twist the brakes, to move them, go down and cut off as many cars as you want and take out and switch.

Q. Do you keep any record of where you put the cars when you have switched them, on the switch-card?

A. You mean on the switch-list?

Q. Yes, on the switch-list, did you make a record on the switch-list of where you put the cars?

A. No, I don't.

95 Q. What record have you then, of where the cars have been placed?

A. Well, I remember it, I tell the yardmaster at night where I leave all the cars that I have handled during the day, and turn in my lists that I haven't finished.

Q. During the day you find a number of defective cars, or cars that need repair?

A. Yes, sir, I do.
Q. What was your practice to do with those cars?
A. Put them on the bad-order track.
Q. And wasn't it your practice to indicate on the switch-list that you so put them?
A. No, sir.
Q. You have a man known as a car-inspector, have you not?
A. Yes, sir.
Q. What is the duty of the car-inspector when the train arrives?
A. Why, he looks that train over for bad-order cars and defective cars.
Q. And if he finds any bad-order cars, what does he do?
A. Why, if it is bad enough so that it has to go to the repair-track, why he puts a repair-track tag on it; if it is a light repair, probably if he has got time to fix it, he fixes it in the yard.
Q. Well, if he finds a car with the pin-lifter gone and the brackets broken away that were on those, and the buffer iron out of repair, as was testified to, what does he do with it?

Mr DAVIS: Objected to as incompetent, irrelevant, immaterial and not proper cross-examination.
96 COURT: I will permit the question to be answered, overruled.
Mr. DAVIS: Exception.

A. Why that car would have to go to the repair-track.
Q. When you come along and examine the cars, you find his tags, then you make a further examination yourself, I suppose?
A. No, sir, I do not.
Q. When you see that he has put a tag on, a repair-track tag, you have that car switched to the repair-track?
A. We have that car put on the bad-order track.
Q. You just stated, Mr. Otos, that he puts a repair-track card on the car. I show you defendant's Exhibit 2; is that the kind of a card that you referred to?

Mr. DAVIS: Objected to as incompetent, irrelevant and immaterial and not within the issues, and not proper cross-examination.
COURT: Objection overruled.
Exception.

A. I don't understand that question.
(Question read.)
A. Yes, that is the kind.
Q. In what position are those repair-track cards placed on the car?
A. Why, they are put near the ladder end, on each side.
Q. Isn't it a fact Mr. Otos, that it was your custom as you came along the train that you were about to switch or in the act of switching, when you found a car with a repair-track card on it, in a defective condition, that you have a chalk and make a check-mark
97 or chalk mark on the car and to look it over yourself, showing the track that it was to go on?

Mr. DAVIS: Objected to as immaterial, irrelevant, immaterial, not within the issues and not proper cross-examination.

COURT: Objection overruled.

Exception by plaintiff.

(Question read.)

A. No, sir.

Q. Wasn't it your custom to so mark with a check-mark any car showing the track that it was to go on?

Mr. DAVIS: Same objection as last above.

COURT: Objection overruled.

Exception.

A. Now, like wheat and things like that, that would never be handled again during the day, we would probably never mark; a short load, loads for between terminals, would probably be marked so that the crew that would come on after we came off would know what the cars were.

Q. Then sometimes cars were check-marked that way and sometimes not?

A. Yes, sir.

Q. The purpose of putting those check-marks on was so that you switchmen and switch-tenders would know what place they should go, if you weren't there?

Mr. DAVIS: Objected to as incompetent, irrelevant, immaterial, not proper cross-examination and not within the issues.

COURT: Objection overruled.

Exception.

(Question read.)

A. Why, the switchmen was out with them all the time, I
98 would tell them where to line up the cars.

Q. In case you did use those chalk-marks, that is the purpose you used them for, as I understand you?

A. I didn't quite understand the question, Mr. Johnson.

Q. You stated that sometimes you did use those chalk marks and sometimes not?

A. Yes, sir.

Q. I say, when you did use them, you used them for the purpose of giving that information to your switchmen and switch-tenders if you weren't there?

A. Why, yes, it showed what was in the car and things like that, it shows what was generally in the car, and the destination of the car.

Q. And what they should do with the car?

A. Why, yes.

Q. Now, Mr. Otos, when did this train containing this car in question, I don't remember the number of it, 125896, when did that train arrive from Willow Lake, South Dakota?

A. I should think about around five o'clock or probably little later.

Q. You don't recollect the exact time?

A. No, sir, I couldn't say the exact time it arrived on.

Q. What was the first thing that you did after it arrived?

A. Well, after we got a list of the train, we went down there and started bleeding the cars and went back as far as where I cut behind the car that we wanted to take out, and started switching.

99 Q. Whom did you get the switch-list from?

A. From the yardmaster.

Q. Who was the yardmatser?

A. P. M. Long.

Q. When you got that you went to this train and proceeded in the manner that you have described?

A. Yes, sir.

Q. Well, what was the first thing that you did, I mean now what particular act, in reference to that train?

A. The first thing that we did, we went down there to the switch-engine and coupled onto that, and we started——

Q. What is that?

A. We went down there to the switch-engine and coupled onto that and started bleeding the cars, or the air in them.

Q. By "bleeding a car" you mean you let the air out?

A. Yes, we release the air, and if the brakes are set we have to release the brakes, in order to move them.

Q. After you had bled the cars what did you do?

A. We went out and we took them out on the line and started switching.

Q. Where was this train when you first came to it, what track?

A. I don't remember what track it was.

Q. Do you remember how many cars there were in the train?

A. No, sir.

Q. Well, you went over onto this lead?

100 A. Yes, sir.

Q. And started in to place the cars, and switched them by placing them on the respective tracks that they were to go on?

A. Yes, sir.

Q. What do you call that, spotting the cars?

A. Kicking them onto the tracks where they go.

Q. How many of the cars in the train had you kicked in that manner, or placed on the particular track it was to go, when the accident occurred?

A. I don't remember.

Q. You don't remember that at all?

A. No, I don't.

Q. You remember how many cars there were in this train, this switched train, at the time the accident occurred?

A. Out on the lead, you mean?

Q. Out on the lead, of the train that you were——

A. You mean that we had hold of with the switch-engine?

Q. Yes.

A. Oh, I should judge probably 12-15.

Q. Which way were these sorting tracks as you call them, which direction from where you were on the lead?

A. Why, the leads runs northwest and southeast, and these switching-tracks they run east and west.

Q. Well, speaking of this system substantially as east and west, which direction were you with the train from these tracks, east or west?

A. You mean where we were?

Q. Which direction?

101 A. We was right on the lead.

Q. Yes, but which direction from those particular tracks were you shoving the cars when you were placing them?

A. We was kicking the cars west.

Q. Kicking the cars west?

A. Yes, sir.

Q. At the time of the accident you were in the act of placing or kicking a car attached to this particular car were you?

A. Yes, sir.

Q. And where were you going to put that car?

Mr. DAVIS: Might not the record show *that* what you mean by this particular car? By the "particular car" you mean the one that had the pin-lifter gone?

Mr. JOHNSON: Yes, car 125896.

Q. What were you doing with the end car of your train?

A. You mean the car——?

Q. The car furthest west?

A. That was attached to this one that you spoke of?

Q. Well, the one furthest west of the whole train?

A. I was trying to switch them onto the Duluth track.

Q. What was the number of the Duluth track that day?

A. I don't remember.

Q. After you had placed this Duluth car,—was it, that you were in the act of switching——?

A. Yes.

Q. What were you going to do with car 125896?

102 A. I was to put that on the wheat track.

Q. On what track did you say?

A. That was a car billed for Minneapolis, and I was to put that on the Minneapolis track, the wheat track.

Q. I believe you testified that there was a bad-order track that day, did you?

A. Yes, sir.

Objected to as immaterial. Objection overruled.

Q. And you had the switch-list which you had received from the yard-master?

A. Yes, sir, I did.

Q. Under which you were working?

A. Yes, sir.

Q. If you saw that switch-list again, would you know it?

A. Why, I don't know, it would be pretty hard for me to tell it now.

Q. Who was the conductor on the train, on this train that you were switching that was brought in from Willow Lake with this car where the pin-lifter was gone?

A. I don't remember who it was.

Q. Was it Le Suer?

A. It might have been Le Suer, I couldn't say.

Q. Showing you defendant's Exhibit 3 (shown witness), I will ask you what that is?

A. That is a switch-list.

Q. That is a switch-list such as you have testified to?

A. That is the kind of switch-list——

Q. This switch-list has car 125896 in it?

A. Yes, sir.

Q. Now, is that not the switch-list that you had there at
103 that time, switching this train?

A. I wouldn't swear to whether it is, I can't say that it is not, I wouldn't know; I haven't any way of knowing.

Q. It might be?

A. It might.

Q. You wouldn't say that it isn't?

A. No, I don't know, and I wouldn't say that it is.

Q. You see that the number of that car is on?

A. Yes, sir.

Q. This speck of blood is on, several specks of blood?

A. Yes.

Q. Don't you think, in view of those conditions, that it is the switch-list?

A. It might be the switch-list, yes, sir.

Q. In your best judgment it is, isn't it?

A. No, sir, I wouldn't say that it is and I wouldn't say that it isn't, Mr. Johnson.

Q. Calling your attention to this pencil notation opposite the number 125896, I will ask you,—that is in the outer margin, toward the right of the list,—I will ask you what that is?

A. Why, that is a bad-order mark, B. O., that indicates bad order.

Q. "B. O." that indicates bad order?

A. Yes.

Q. What significance has that when it is on the card?

Mr. DAVIS: Objected to as immaterial, not proper cross-examination, not within the issues.

COURT: Objection overruled.

Exception.

(Question read.)

104 Q. On the list, what is it you call this—switch-list? I mean on the switch-list?

A. Why, if this was on the switch-list it ought to go to the bad-order track.

Q. That is according to custom, according to your regular custom, that should go to the bad-order track if it was on the switch-list, as I understand you?

A. Why, it ain't always on the switch-list.
Q. Why, I say, if it is?
A. Yes, I say, if that was on the switch-list that is where the car ought to go.
Q. And when you received this switch-list from the yardmaster, there was no bad-order marks on there was there?
A. On the switch-list, you mean?
Q. Yes, on the switch-list?
A. No, sir.
Q. When a train comes in the car-inspector inspects the different cars and designates them "repair-track" if they are out of repair, as I understand you?
A. Yes, sir, he does.
Q. And then you get the switch-list, or the switch foreman get the switch-list from the yard master?
A. Yes, sir.
Q. How are these bad-order marks put on and by whom?
A. Why, the man that has got the list, switching them.
Q. The switch foreman puts them on?
A. Yes, sir.
105 Q. That is what you were in this case, that is what you were doing in this instance?
A. Doing what?
Q. Switch foreman?
A. I was the foreman, yes, sir.
Q. So that if any bad-order notations were to be made on the switch-list as you have described, you were the one to do it, you had charge of the list?
A. Yes, I had charge of the list.
Q. You said you were the switch foreman?
A. Yes, sir.
Q. That means that you had charge of this train?
A. Yes.
Q. You were the boss, so to speak, you directed all the movements of this train?
A. Of course, you know I was under the yard master.
Q. Yes, I understand, but he was not exercising any immediate control over this train after he had given you the list?
A. No, he told me to go ahead and switch it, and that is all.
Q. And after he had given you the list and told you to go ahead, why then you were the boss, the man that directed all the movements of this train?
A. Yes, sir.
Q. The engine could not start or stop except by orders from you?

Mr. DAVIS: Objected to as incompetent, irrelevant, immaterial, not within the issues, and not proper cross-examination.
COURT: Objection overruled.
Exception.
(Question read.)

106 A. Why, yes, either I or the men that was with me could give a signal to the engineer, and he would work according to that.

Q. You would give the signals to them, wouldn't you?

A. You mean the switchmen?

Q. Yes, they worked under your directions, did they not?

A. They was under my directions, yes, sir.

Q. You are supposed to give all the signals to the engineer, are you not, as to the movements of the train?

A. Well, now, if I should happen to send them out to do some work while I was marking up another bunch of cars, the engineer would work according to their signals then.

Q. You did mark up cars then?

A. Oh, sometimes I do and sometimes I don't.

Q. Well, if you were there then, of course, you were the one to give the signals?

A. Yes, sir.

Q. As foreman?

A. Yes.

Q. You were giving the signals at the time immediately preceding the accident, were you not?

A. Yes, sir.

Q. What movement was this train making just before the happening of the accident?

A. I don't understand your question by "movement."

Q. Well, what was the particular act you were engaged in?

A. Well, I was kicking cars, that is what I was doing at the time I was hurt.

107 Q. You had given a signal to stop?

A. I had given the signal to kick them, and I had given the signal to stop them, at the time I got hurt.

Q. Before you went in between the cars you had given the engineer the signal to kick and stop?

A. I gave him the signal to kick them, when I thought they was going fast enough I gave them the signal to stop, and stepped in between.

Q. You first signalled him to kick?

A. Yes.

Q. And then after it had acquired the required rate of speed then you signalled him to stop and then you went in between the cars?

A. Yes, sir.

Q. The cars, when you gave him the first signal, the signal to kick, weren't moving fast enough, in your opinion?

A. Why——

Mr. DAVIS: Objected to as assuming a fact in evidence not proven.

Q. I mean before he gave the signal to kick?

COURT: Objection sustained.

Q. The cars were still moving when you went in between them?

A. Why, yes, they would have to be moving or I couldn't kick them.

Q. Now you stated that you went in between these cars while they were moving; isn't it against the rules to go in between moving cars, the rules of the Company and the rules of your employment?

Mr. DAVIS: Objected to as not the best evidence, incompetent, irrelevant, immaterial, and I ask them to put in writing what
108 they expect to show by this cross-examination,—as not within the issues and not proper cross-examination.

COURT: I think I will permit it, it may not be strictly cross-examination.

Mr. DAVIS: I think it is immaterial under the law; the courts have repeatedly held they can't make a rule to defeat the federal act.

COURT: That is true, of course, that can't be done.

Mr. DAVIS: It is immaterial, I should think.

COURT: Well, they couldn't make a rule to defeat the federal act or convert that into an assumption of risk, as I understand it, which might be contributory negligence. I think I will permit that to be answered, and go in. The only question I have in my mind is whether it is proper cross-examination. I think it is not, but it is in line somewhat with evidence already received.

Mr. DAVIS: Exception.

(Question read.)

A. I suppose it is.

Q. It is one of the cardinal rules, one of the first rules that a railroad man learns?

Mr. DAVIS: Objected to as incompetent, irrelevant, immaterial, not proper cross-examination, argumentative, calling for a conclusion, and repetition.

COURT: He has answered the question; objection sustained.

Q. I will show you Defendant's Exhibit 4 (shown witness) and ask you whether or not that is not one of the rule-books which you receive as an employee of the railroad company?

A. Yes, sir, it is.

Q. You received one of those?

109 A. Yes, sir, I did.

Q. I will show you Exhibit 4, and call your attention to subdivision B—paragraph B, I guess it is, on page 66; just read that to yourself. (Witness does so.)

Q. When you entered the employ of the company, or during the employment, you have to learn these rules so that you can pass an examination on them, have you not?

A. Yes, sir, we do.

Q. At the time of the accident didn't you know the rule which you have just read, and which reads as follows:

Mr. DAVIS: I object to the reading of that rule at this time, as no foundation laid, not proper cross-examination, incompetent, irrelevant, immaterial and not within the issues.

COURT: Well, I think it is probably defensive. I don't think

we should have the entire defense introduced on the cross-examination of this witness.

Q. I will show you defendant's Exhibit 5 (shown witness), and ask you whether you have ever seen one like that?
A. Yes, I did, they sent them out years ago.
Q. You received one?
A. I think I did.
Q. One of them is addressed to the Superintendent of the Great Northern Railroad?

Mr. DAVIS: Objected to as not proper cross-examination.
Mr. JANES: May it please the Court, aren't we permitted to cross-examine the plaintiff upon all the issues?
COURT: That question may be answered.

110 Q. I show you and call your attention to that part on one side which shows an address to the superintendent of the Great Northern Railroad, and ask you whether or not you didn't sign it on the line as indicated on the opposite side of that, and return it to the company?
A. I might have done it, I don't remember, it is some years ago since they sent them out.
Q. You wouldn't say that you didn't?
A. I couldn't say that I didn't, and I couldn't say that I did.
Q. At the time that you received this they required that of all the employees did they not?

Mr. DAVIS: Objected to as not the best evidence, incompetent, irrelevant, immaterial, and not proper cross-examination.
COURT: Objection sustained.

Q. How many tracks were there in the yards at Willmar in September, 1912, when this accident occurred?
A. There is 12 tracks in the old yard and five in the new.
Q. 17 in all?
A. 17 in all.
Q. Can you locate the place of the accident with reference to the guard-rail?
A. You mean which guard-rail my foot was caught in?
Q. Yes.
A. I think it was the guard-rail between switches 5 and 6.
Q. That would be guard-rail 5?
A. Why, I don't know how they number the guard-rails, I never paid no attention to that.
111 Q. Well, you went in between these moving cars to uncouple them, as I understand?
A. Yes, sir, I did.
Q. You didn't uncouple them?
A. I don't know whether they separated or not, I can't say.
Q. How long were you in between the cars before the accident occurred?
A. Why, I just stepped in, and the minute I stepped in why I stepped right into the guard-rail, and the wheels were about four inches behind me, so I couldn't have been there very long.

Q. It was pra-tically instantaneous then, wasn't it?
A. Yes, sir, it was.
Q. You fell on the guard-rail?
A. In between the guard rail and the main rail.
Q. Just as you were stepping in?
A. Yes, sir.
Q. What?
A. Yes, just as I stepped in the main rail.
Q. You know at what point or place on the guard-rail that you stepped in?
A. No, sir, I don't.
Q. You haven't any idea of where?
A. No, I haven't.
Q. Didn't you look when you stepped in?
A. Why, no, I never looked down, I was looking up, looking towards where I was going to uncouple the cars.
Q. You didn't pay any attention to anything but the pin?
A. That is all.
112 Q. You did not get inside of the guard-rail then, as I understand it?
A. I stepped over the main rail, right in between the guard-rail, in between the main-rail, see, on the inside. I stepped in over the main-rail, in between the guard-rail and the main-rail.
Q. And there you were caught at once?
A. Yes, sir, I was.
Q. Aren't you able to give us any estimate as to where on the guard-rail you were when your foot was caught by the wheel and you threw yourself out, as you testified to?
A. No, sir, I don't know, I have no idea where I stepped; it must have been either end, that is all I know.
Q. I understand you did not reach the pin, you was caught before you got it?
A. Yes, I think I was.
Q. And I am going to have you show us, if it is possible, how your foot got caught. Now this is west, as I understand it your cars were being—(indicating).

COURT: This rail has been reversed this morning.
Q. Yes, the rail has been reversed, this is west as I understand it.
Mr. DAVIS: The west wall of the court-house is west.

Q. The end of the rail marked "west" represents the westerly direction.
A. That means that is the west end of the yard at Willmar?
Q. Yes. That is the direction that you were switching the cars, as I understand?
113 A. Yes, I was going that way.
Q. Which direction, then, were the cars from the engine?
A. The cars would be west of the engine.
Q. And the locomotive, then, was pushing the cars?
A. Pushing the cars west.
Q. You went in between the cars towards the west end of the train?

A. Well, I don't know whether it is the west end.
Q. The locomotive was on the east end, wasn't it?
A. Yes.
Q. So you were towards the west end?
A. I was west of the locomotive.
Q. And now just as you stepped in your foot got caught?
A. Yes, sir.
Q. As I understand you?
A. Yes, sir.
Q. Now then, which way were you turning when your foot got caught?
A. Well, I was facing west, myself.
Q. You were facing west, yourself?
A. Yes, sir.

Mr. JANES: Turn, Mr. Lende, and illustrate.
(Illustrating on the rail model with Mr. Lende.)

Q. Well, if this is this way, you were out here, you were on the north side?
A. Why, I was on the north side of the main rail.
Q. Now then, you stepped in southward?
A. I stepped southward, yes, sir.
114 Q. Where did you step?
A. I stepped into the guard-rail.
Q. I understand you were caught instantaneously,—as soon as you got in there?
A. As soon as I stepped in there I felt my foot was caught and I couldn't move it.
Q. Well, which way were you turning when your foot was caught?
A. I was facing west when my foot was caught.
Q. Now, then, where was your other foot?
A. My other foot would be outside.
Q. Outside of the main rail, just like now?
Put your foot down there, will you please (to Mr. Lende), right like that, one foot in the guard-rail and one foot on the outside like that (illustrating with Mr. Lende), that was the way your foot——?
A. Well, my foot was inside.

Mr. DAVIS: Put this heel in.
Mr. JANES: Just a minute, we are examining this witness.

Q. What part of your foot was caught, what part of the foot or shoe?
A. The bottom of my foot, the whole foot was in there.
Q. You were in this position as you claim, that your foot was down in?
A. Right down in.

Mr. JOHNSON (to Mr. Lende): Just stand in the pisition that he indicated.

Q. Your other foot was about the way Lende's is now?
A. Outside of the rail.

Q. Outside of the rail,—well, that is. Now, then, when
115 you felt your foot was caught what did you do?
A. I threw myself out.
Q. Over this way (indicating)?
A. Yes, sir. Well, I got as far as I could to get away from the car.
Q. How?
A. Outside.
Q. Which way did you throw yourself?
A. To the north.
Q. How did you alight?
A. I don't know how I lit, I must have lit—I am sure I don't know, some place on my back.
Q. The car was following you up from behind, wasn't it?
A. The car was going west.
Q. And was hitting towards your back?
A. I don't know whether it hit my back or not.
Q. You don't know, but it was moving?
A. The car was moving.
Q. And your foot was caught; now then, you must have struck on your face, forward, didn't you?
A. If I struck on my face—if I struck on the rail why the car would have mashed me all the way up here (indicating).
Q. I didn't ask you if you struck on the rail. I understood you to say that you threw yourself out?
A. Yes, sir.
Q. Now, if you did that, of course you wouldn't strike the rail?
A. Oh, no.
Q. I am now asking, if you threw yourself out so that you got outside of the rail, then in the position that you were there,
116 didn't you naturally fall forward, outside of the rail?
A. I don't know which way I fell.
Q. The wheel caught you from behind, did it not?
A. Yes, sir, it did.
Q. You had thrown yourself to the side, so that you went outside of the rail?
A. Yes.
Q. Now, then, don't you know that you went sidewise and forward?

Objected to as repetition. No ruling.

A. Well, I couldn't tell which way I fell, Mr. Johnson.
Q. You don't know?
A. No.
Q. Well, you wouldn't say that you didn't?

Mr. DAVIS: Objected to as argumentative and repetition.
COURT: Objection sustained.

Q. When you are switching you have assistants with you?
A. You mean I have men working with me?
Q. Yes.

A. Yes, there is.
Q. How many?
A. Two men.
Q. What do you call them?
A. Why, they are called helpers.
Q. Helpers, or fieldmen?
A. Why, one is a field man and one follows the engine.
Q. You had two helpers, or such as you describe?
A. Yes, I did.
117 Q. With you at this time?
A. Yes, sir, I did.
Q. Who were they?
A. Mr. Conway and Mr. Brogren.
Q. The reason you went in between the cars, as I understand it, was that this pin-lifter which goes to the outside of the car, was gone?
A. Yes, sir.
Q. Now, you could have stopped the car, could you not?
A. Oh, yes.
Q. And then gone in and pulled out the pin?
A. There would have been no kick then, the car would have been standing still.
Q. But you could have done it that way?
A. Oh, yes.
Q. And that would have been perfectly safe would it not?

Mr. DAVIS: Objected to as immaterial and not within the issues.
COURT: Overuled.
Mr. JANES: It is very material, if the Court please.

Q. You can answer.

(Question read.)

A. Why, yes, that would have been safe.
Q. And on the car that you was going to detach there is also a draw-bar and a pin in it, was there not?
A. Yes, there is a pin on the other side.
Q. On the other side of the other car?
A. Yes.
Q. Now then, you could have detached that car in perfect
118 safety by either yourself or one of your men going to the other side and lift your pin there, could you not?

Mr. DAVIS: Objected to as incompetent, irrelevant, immaterial, not within the issues, and not proper cross-examination.
COURT: Overruled.
Exception.
(Question read.)

A. Yes, after I stopped the train.

Recess.

B. T. OTOS, was called as a witness on behalf of the plaintiff and duly sworn.

Direct examination.

By Mr. DAVIS as follows:

Q. Your are the father of Harry Otos?
A. Yes, sir.
Q. And you live at Willmar?
A. Yes, sir.
Q. How long have you lived in Willmar?
A. That will be forty years this summer.
Q. Where did you live previous to going to Willmar in this state?
A. You might say I came from Norway.
Q. But where in this state did you live?
A. We lived just a few miles over by the Minnesota River.
Q. Near Granite Falls?
A. Yes, in Renville county.
Q. And you moved from there to Willmar?
A. Yes.
119 Q. You have been living in Willmar for about forty years?
A. Yes, it will be next summer.
Q. What business are you engaged in?
A. Barber.
Q. Were you present at Willmar, Minnesota, when your boy was hurt?
A. Yes, sir.
Q. Did you go with your son to get the number of the car upon which the pin-lifter was gone, did you go with him or afterwards?
A. I think I went afterwards.
Q. Did you afterwards take a photograph of that car?
A. Yes, sir.
Q. With Mr. Forssberg, the photographer?
A. Yes, sir.
Q. And when such photograph was taken did you observe the number of that car?
A. I did.

Mr. JANES: We admit that is the right car.
Mr. DAVIS: You admit that this car which Mr. Otos examined after the accident was car 125896?
Mr. JANES: Yes.
Mr. DAVIS: Upon which the pin-lifter was missing?
Mr. JANES: Yes.
Mr. DAVIS: And do you also admit that two brackets were broken upon the car?
Mr. JANES: Yes, and one was an old break and the other was a new break.

Q. When did you first see your son in the hospital?

A. It was about six o'clock.

120 Q. That evening?

A. Yes, sir.

Q. Did you see him quite often there afterwards?

A. Yes, I went there you might say every day.

Q. For some 11 weeks?

A. Yes, sir.

Q. And during the time that he was staying in the hospital you may state whether or not you could observe from his condition as to whether or not he was suffering pain?

A. Well, he was suffering all the time as far as I know.

Q. And after he left the hospital where did he go?

A. I took him over to my home.

Q. Took him to your home?

A. Yes.

Q. How long did he stay with you?

A. I took him home the day before Thanksgiving, and he staid with me until the next April, somewheres around the 20th to 21st of April.

Q. And his wife was staying with you?

A. Yes, sir.

Q. What was the condition of your body as to being strong and healthy previous to his injury?

A Well, sir, as far as that goes, I never seen him sick that I know of, he was strong.

Q. When your boy came home, after he had left the hospital, who attended to him, and cared for him?

A. His wife.

Q. And did you ever assist, did you ever help him?

121 A. Well, I helped to a certain extent, when it was necessary.

Q. Did you notice his condition as to suffering pain since, and during the time he was at your home?

A. Yes.

Q. From his appearance and general condition and action I will ask you whether or not he has shown any signs of suffering since his injury, during the time he was at your home, during the time he staid at your house, did he show any signs of pain and suffering?

A. Oh, yes, all the time.

Q. In what way?

A. Why, he was always complaining about——

Q. On Saturday nights I presume you came home later?

A. Why, I close the shop at 12 o'clock.

Q. During the time he staid at your home, you may state to the jury if you observed the condition of his sleeping?

A. When I came home late, or after I closed the shop, I generally went in the bed-room there and always found him awake, especially Saturday nights, coming home at between somewhere around one, and sometimes it would be two o'clock.

Q. Did you ever use to sit up with him?

A. Yes, I staid there and talked with him, sometimes until three or four o'clock in the morning.

Q. Do you know Mr. Eben Lawson of Willmar?

A. Yes.

Q. He is one of the men connected with Willmar Tribune?

A. Yes, sir.

122 Q. And did you go with him down to the yards at Willmar sometime before the trial last April?

A. Yes, sir.

Q. Did you point out to him a car of which you asked him to make a drawing?

A. Yes, sir.

Q. And you saw the car of which he made a drawing?

A. Yes, sir, I did.

Q. You also saw the car on which your boy was injured?

A. I did.

Q. I will ask you whether the car by which your boy was injured and the car of which a drawing was made was identical as to the apparatus on there?

A. Yes, the same thing.

Q. And did you also point out to Mr. Lawson the frog in the guard-rail in which your boy's foot was caught?

A. Yes, sir.

Q. And showed him where it was, where the guard-rail was?

A. Yes, sir.

Q. You were there with the photographer?

A. Yes, sir.

Q. Did you measure the guard-rail?

A. I did.

Q. What was the distance between the guard-rail and the main rail?

A. Well, I measured across right up by the casting there, it measured three inches and five-eighths.

Q. At what point? I want to call your attention to where
123 the capital letter A appears in red pencil; is this at about the point you measured the space?

A. Yes, sir, right like this.

Q At the end of the blocking?

A. Yes.

Q. East end or west end, which end was it?

A. This will be on the west end of the blocking, the smallest end.

Q. Go to the other end, this is turned around, Mr. Otos. I call your attention to the letter B at the west end of this Exhibit 1; I will ask you if you measured the distance at the end of the blocking between the guard-rail and the main rail?

A. Yes, sir.

Q. At Willmar, where your boy was hurt?

A. Yes, sir.

Q. State to the jury what that distance was, as you measured the identical track he was hurt on.

A. It measured three inches and five-eighths.

Q. Now, with reference to the shoe that has been introduced in evidence, I will ask you if you know who picked it up?
A. I picked it up.

Mr. JOHNSON: He asked you if you knew.

Q. I will ask you whether you picked it up?
A. Yes, I didn't pick it up from the ground, but I took it home.
Q. Where did you get it?
A. It lay right on the tie-pile.
Q. It lay on the tie-pile?
A. Yes, right across.
Q. You took it home?
A. Yes.

Q. How far from the place of the accident was it when
124 you saw it?
A. The shoe?
Q. Yes?
A. Oh, I don't know, the tie-pile isn't so far from there, I couldn't say just exactly how far it is, it isn't very far.

No cross-examination.

EBEN LAWSON was called as a witness on behalf of the plaintiff and duly sworn.

Direct examination.

By Mr. DAVIS:

Q. Where do you live?
A. Willmar.
Q. What is your business?
A. I am connected with a newspaper.
Q. You are a brother of Victor Lawson of the Tribune?
A. Yes, sir.
Q. Are you acquainted with Harry Otos, the plaintiff in this case?
A. Yes, sir.
Q. How long have you known him?
A. I have known him about three years, I have known of him for many years.
Q. Were you with him at the time he was injured.
A. No, sir.
Q. You weren't with him at that time?
A. Yes, sir.

Q. Were you down to the railroad yards shortly after his
125 injury?
A. Yes, sir.
Q. Who did you go down with?
A. I went down with a fellow by the name of Hugh Cannell.
Q. Did you notice the car that went over his foot?
A. Yes, sir.
Q. Did you observe the condition of that car?

Mr. JANES: I admit the condition.

Q. Did you notice the condition of the car that went over his foot?
A. It was a common, ordinary car, the pin-lifter was off, I observed that, yes.
Q. How did you know it was the car?
A. Well, I saw blood and the crushed meat on the wheel.
Q. Did you observe the guard-rail and the main rail there on that?
A. Yes, sir.
Q. Could you tell as to where he was hurt, did you observe anything on the guard rail and main rail, any flesh or blood?
A. Yes, I saw the crushed meat and the blood, and shreds.
Q. Did you observe as to whether or not there was any blocking between the guard rail and the main rail?
A. No, sir, there was none.
Q. At the point where this blood appeared?
A. No, sir, there was no blocking.
Q. You observed the car also,—the pin-lifter was gone?
A. Yes, sir.
126 Q. The pin-lifter was gone?
A. Yes, sir.
Q. I will ask you if at the time that you went down there whether you were on the same side upon which the pin-lifter was missing or not?
A. Yes, sir.
Q. On the north side, and did you notice the side of the box-car, on the north side did you notice the side of the box-car?
A. Yes.
Q. I will ask you to state to the jury whether or not there was any bad-order tag on that car at the time you were down there?
A. I saw no tag.

Mr. JOHNSON: Objected to as leading and no foundation laid.
COURT: Overruled.

Q. You know what a tag like this is (Exhibit 2 shown witness)?
A. Yes.
Q. Did you observe any such tag on this car when you went down there?
A. No, sir.

Mr. JOHNSON: Objected to as no foundation laid and leading.
COURT: Overruled.

A. No, sir, there was no tag that I saw.
Q. You observed the end of that car?
A. I wasn't looking for any tags but if it had been it seems to me I would have seen it; I never thought about the tags when I was down there.

Cross-examination.

By Mr. JOHNSON:

Q. Mr. Lawson, showing you defendant's Exhibit 1, is that
127 a substantial reproduction of the guard-rail in question, and a part of the main rail lying along side of it?

A. Yes, sir.

Q. Now, will you indicate on the guard-rail where you noticed that there wasn't any blocking,—you say there was no blocking?

A. No.

Q. You observed that there wasn't any blocking in a certain place?

A. Yes.

Q. Will you please indicate on defendant's Exhibit 1 where you noticed that, that the blocking wasn't there?

A. Well, I noticed it other places in the yards there at Willmar.

Mr. JANES: Answer that question.

Q. Answer me now, didn't you say that you observed that there was no blocking at a certain place at the guard rail where this accident occurred?

A. Yes.

Q. Now, then, I wish you would point out with the letter D, capital D, the spot where you observed that the blocking was not there?

A. It will make a long D.

Q. I mean just at the place, indicate the place, that is all?

A. Well, I looked over and along the whole guard-rail, why, there was no wooden blocking like there is at other places in the railroad yards there at Willmar.

Mr. JOHNSON: I ask to have the letter part of the answer
128 stricken out as not responsive to the question, the question being to indicate on this particular guard-rail where the blocking was absent, and the witness has volunteered information relative to other places in the yards relative to this guard-rail.

COURT: I think possibly a part of that answer should be stricken out, that is that part referring to the blocking on other rails, but I think the earlier part of the answer should stand, that there is no blocking between the guard-rail and the main rail here, no blocking any place, as I understand you to say?

WITNESS: Yes, sir, no blocking.

Q. Now, Mr. Lawson, with reference to the blocking, is this Exhibit 1, defendant's Exhibit 1, in the same condition as the guard-rail and the other rail, the main rail, was where you examined it, as you have testified to?

A. I didn't quite catch that.

Mr. JOHNSON: Question withdrawn.

Q. I call your attention here to defendant's Exhibit 1, which is this guard-rail and a part of the main rail of this whole construction here; I will ask you whether or not defendant's Exhibit 1 with reference to the blocking is the same as you found it at the place of the accident?

Mr. LENDE: Yes or no.

Q. You can tell whether it is or not, answer by yes or no, is it or is it not?

A. I didn't see those pieces there, I don't think they was.

Mr. LENDE: Indicate by C and D where those were.

A. I think it is practically the same, but I feel as though
129 I don't remember seeing these large pieces in here, it seems it was just a small bolt in there.

Q. Is that what you meant when you said that the block wasn't there?

A. No, sir.

Q. That isn't what you referred to?

A. No, sir.

Redirect examination.

By Mr. DAVIS:

Q. What did you mean when you said the blocking wasn't there, explain that to the jury, step to that and explain it, show them what you mean when you said there wasn't any blocking there?

A. Well, two—three years before that—in some places in the yards——

Q. State what you mean that there was no blocking?

A. Well, there is a wooden piece fastened in here——

Mr. JOHNSON: I object to that as not responsive to the question.

(Question read.) Referring to this particular guard-rail?

A. I mean that in this particular guard-rail there was no wooden blocks placed in here for the protection of the feet. There was a man killed there just the same way shortly before.

Mr. JOHNSON: I ask to have that part of the answer stricken out as not responsive and immaterial.

COURT: Granted.

130 ANNA SCHOLLIN was called as a witness on behalf of the plaintiff and duly sworn.

Direct examination.

By Mr. DAVIS:

Q. Your name?

A. Anna Schollin.

Q. Where do you live, Miss Schollin?

A. Willmar.

Q. What is your occupation?

A. Nursing.

Q. How long have you been engaged as nurse?

A. Six years.

Q. Where did you take your work as a nurse?

A. St. Mary's Hospital, Minneapolis.

Q. You are a graduate nurse?

A. I am.

Q. And did you in the month of September have occasion to take care of Mr. Otos?

A. I did.

Q. I wish you would state to the jury what his condition was both as to suffering pain and his general physical condition, the condition of his leg and his fever and such things, at the time he came under your care first?

A. When I took charge of the case he was in a comatose condition.

Q. What do you mean by comatose?

A. Well, semi-conscious; a very high fever and his limb was in very bad condition. There was a discharge from it from the very beginning; and a very weak pulse. This lasted for almost a week.

131 Q. What was his condition as to having fever?

A. Very high fever all the time.

Q. About how high.

A. Well, 103,—102 and 103, on the average.

Q. Normal temperature is what?

A. 98 and 3-5.

Q. Now, during the time that you took care of him I will ask you if you did anything in the way of dressing and taking care of the limb?

A. I did.

Q. Tell the jury what you did particularly, telling them in particular detail what you did and the condition it was in.

A. The doctor would have charge of the limb, but at times that he couldn't come I had to change the dressing, and this was done sometimes twice a day; at first anyway.

Q. During the time that his leg was in an inflamed condition, you may state its condition then as to pus,—as to whether there was pus or not?

Mr. JANES: There is no dispute on that, that has all been gone over, excepting to repeat again.

COURT: Overruled.

Q. You may state the condition of his leg as to the running of pus while you were attending to it?

A. There was pus running from his limb all the time that I took care of him.

Q. And that was for eleven weeks?

A. Yes.

Q. You may state to the jury from his condition what you observed as to whether or not he appeared to be suffering pain.

A. He suffered intense pain nearly all the time.

132 Q. During the time that you were caring for him did you ever do anything about attending to his back?

A. I did.

Q. State to the jury where this pain in the back was and what you did, Miss Schollin?

A. The pain in the back was in the lower part, and I rubbed the back with alcohol and used hot water bags.

Q. You may state to the jury whether or not you observed his condition as to sleep and rest?

A. He slept very little.

Q. How did he sleep when he first came there, how was sleep induced?

A. Not at all; by medicine.

Q. What kind of medicine, opiates?

A. Opiates.

Q. How long did that condition continue, how many weeks?

A. Well, the first five—six weeks.

Q. Miss Schollin, did you attend to him just nights, in the night time, or in the day time?

A. All the time, night and day.

Q. And during all that time did he sleep at all,—during the first eight weeks, without opiates,—or any natural sleep?

A. Very little.

Q. Describe to the jury the nature of his sleep, how he would sleep, as to any length of time, whether it was a long-continued rest or just short periods?

Mr. JANES: I will admit that during the first eight weeks that this lady testified to, sleep was not natural, that is, sleep was interrupted, broken, restless, nervous, and anything else the counsel wants
133 to put in there,—during the first eight weeks of this injury.

Q. And he left the hospital on Thanksgiving Day?

A. The day before Thanksgiving.

No cross-examination.

J. C. JACOBS, was called as a witness on behalf of the plaintiff and duly sworn.

Direct examination.

By Mr. DAVIS:

Q. What is your name?

A. J. C. Jacobs.

Q. Where do you live?

A. Willmar.

Q. You are a practicing physician and surgeon?

A. Yes, sir.

Q. How long have you been practicing at Willmar?

A. About five years.

Mr. LENDE: Qualifications admitted.

Q. You are acquainted with Mr. Otos, the plaintiff?

A. Yes.

Q. Did you assist in an operation on Mr. Otos' leg at one time?

A. I did.

Q. Who else was present?

A. Doctor Frost, Doctor Johnson and the nurse.

Q. I wish you would describe to the jury the condition of his limb before amputation, before it was amputated?

134 A. The bone was severed just below the knee joint, and the muscles and skin torn off more or less ragged, with the

skin removed up as far as the hip and buttocks, onto the groin, it leaving the surface of the thigh bare muscle, which was partly torn up into shreds.

Q. Who performed the operation?

A. Doctor Frost, of Willmar.

Q. And you assisted in it?

A. Yes.

Q. When did you first start to attend him, how long after the amputation?

A. About a week, I think the 18th of September.

Q. You took charge of the case while he was still in the hospital?

A. Yes.

Q. And during that time did you see him quite often?

A. Yes, I saw him every day.

Q. You may state to the jury the condition of his leg after amputation, and what you did for it, tell the jury?

A. After that amputation, on account of all the skin being torn away, there wasn't sufficient skin to cover the stump, and left a raw surface of about probably eight inches in diameter.

Q. You mean a circle of about eight inches?

A. Yes, a circle, or approximately a circle, a little longer in one diameter than the other.

Q. State what you did, if anything, to assist in the repair of that stump?

A. All that was done at first was simply dress it antiseptic-
135 ally, and try as far as possible to keep it clean, and local applications of hot or cold, or smaller things of that nature.

Q. Later what did you do?

A. As to the stump directly, that went along, I think, probably about a month, when I grafted some skin on there, on the raw surface.

Q. Describe to the jury the nature of grafting skin on a raw surface, and as to whether or not it is painful?

A. It is painful, as far as you have got to scrape the surface, freshen up the surface that you graft the skin onto. Then you take, in this ca-e another person, put him to sleep and slice a very thin slice of skin off the other person and apply it to the surface that you have been scarifying on the patient, and dress that,—put a dressing on to keep it in place, and in time that will heal on.

Q. I will ask you to state to the jury whether or not that entire surface was covered over with this grafting at once, or it required different operations?

A. I believe there were four or five, probably just four different times.

Q. And this skin was taken from different persons as I understand?

A. Yes, from four different persons.

Q. When this grafting was done, you may state whether or not there was any ulcers ensuing around the margin of the graft?

Mr. JANES: We admit that there was, as testified by the other

witnesses, and we won't dispute the testimony of plaintiff that it has continued down to sometime in July or August, 1913.

136 Mr. DAVIS: And that during all that time it continued with ulcers to the extent of two or three ulcers upon the stump of his leg, from the time of his injury up until July?

Mr. JANES: The doctor has so answered the question.

Q. Mr. Jacobs, you may state whether ulcers ensued after this grafting in and around the margin of the graft?

A. They always were there, because the grafts were not put close enough together but what it left some raw surface in between there. And they remained there until in time they eventually,—this margin of grafts eventually got closer until the whole thing healed up.

Q. You saw and observed the condition of his leg last April in Minneapolis?

A. Yes.

Q. And its condition as to ulcers?

A. I did.

Q. And did you examine the leg yesterday?

A. I did.

Q. Do you know what a nerve tumor is?

A. Yes.

Q. You may state whether there are any of those in the stump of his limb?

A. There is what appears to be a nerve tumor on one of the nerves in the groin.

Q. Describe to the jury what a nerve tumor is?

A. A nerve tumor is a tumor that grows right onto the trunk of a nerve, it encloses the whole nerve and forms a bunch that imbeds the nerve in it.

137 Q. Doctor, did you ever have occasion at different times to perform any operation on this stump?

A. I opened it several times either to remove cinders that were still imbedded in there or else to open the abscess and let some pus out.

Q. Since the trial in April have you had occasion to open the leg?

A. Yes, I removed two cinders since then.

Q. Where were they in reference to the stump, imbedded up under the skin?

A. Not under the true skin, they were under the scar tissue.

Q. Under the scar tissue?

A. Yes.

Q. When was that that you performed this operation after April, after the trial last April?

A. Well, there is one, I don't remember the date,—there is one shortly after, and then one during the fall sometime.

Q. Do you know what his temperature was during this time, about what it was?

A. At what time, during the whole time?

Q. Yes, while he was in the hospital?

A. It varied a good deal, as I remember it, the highest probably was up to 104.

Q. I will ask you to state whether or not he ever complained to you of any pains in the back?
A. Yes, he did, practically——
Q. And where was that pain with reference to the back?
A. It was mostly down over the sacrum, and extending more or less up the back, further up.
Q. That is the lower part of the back?
A. Yes.
138 Q. I will ask you whether or not he ever complained to you of having headaches.
A. Yes.
Q. I will ask you whether or not he ever complained to you of any trouble in passing his urine?
A. He did, especially at first.
Q. Did you examine his urine at one time?
A. I did several times.
Q. State whether or not you found any blood in his urine?
A. I did at one time.
Q. What is that indicative of?

Mr. JANES: Is there a claim here that there is any existing injury to the plaintiff's kidneys? If not, I object to it as immaterial.
Mr. DAVIS: The complaint will determine that.
COURT: Overruled.

Q. You may answer.
A. It is pretty hard to tell what blood might mean, it might come from different sources, it might come from the kidney, it might come from the bladder, or the urethra in between there.
Q. Doctor, I will ask you to state what your opinion is whether the injury to his back is permanent or temporary?
A. I believe it is permanent.
Q. Are you reasonably certain on that point?

Mr. JOHNSON: Objected to as it is not proper examination, incompetent and no foundation laid.
COURT: Overruled.
Exception.

Q. You may answer, are you reasonably certain of that opinion you have expressed?
A. Yes.

139 Cross-examination.

By Mr. JOHNSON:

Q. How long was Mr. Otos at Willmar after you first saw him after the injury, until he went to Minneapolis?
A. The injury was on the 11th of September, and he was at Willmar all the time until he went down for the trial at Minneapolis. He went down there, I was told, a week before the trial.
Q. Well, what time about was that?
A. Well, that was some time in April, I was down the 17th of April, and the case had been going on for——

Q. During this time you was his physician?
A. Yes.
Q. How often did you see him during this time?
A. At the hospital I saw him every day, and for a while after he left there, and after that gradually more seldom, until at last probably I saw him a week before he went down to Minneapolis.
Q. Towards the last you saw him about once a week, is that what you mean to say?
A. Well, I don't remember, I should judge probably about that, the last few weeks.
Q. Since he came back from the trial at Minneapolis have you been his physician?
A. I have.
Q. How often have you seen him since?
A. Not very often, just occasionally.
Q. Just explain a little more fully how often that is?
A. Well, I don't believe I have seen him once a month on the whole.
140 Q. Since last April?
A. Since last April.
Q. You have been his physician.
A. Yes.
Q. That is, he has had no other physician?
A. I couldn't say.
Q. Well, not to your knowledge?
A. No.
Q. You have had charge of his case?
A. Yes.
Q. Since April you haven't seen him once a month?

Objected to as a repetition. No ruling.

Q. I mean you haven't seen him as often as once a month?
A. I should hardly think so, I wouldn't say positively, I should hardly think so.

By Mr. DAVIS:

Q. Doctor Jacobs, during the time you attended him, you may state whether or not he complained of any pain in the groin?
A. Yes, he did.
Q. And any pain in the testicles?
A. Well, I don't know as the pain was exactly in the testicles, it was in the groin, and close up to the scrotum.

Recess until 1:30 p. m.

It is stipulated between the parties hereto that a train or car going from Willmar, Minnesota, to Duluth, Minnesota, does on its way from such city of Willmar, Minnesota, to Duluth, Minnesota, pass through the city of West Superior, Wisconsin, before reaching the city of Duluth.

141 H. KERNS was called as a witness on behalf of the plaintiff and duly sworn.

Direct examination.

By Mr. DAVIS:

Q. Doctor Kerns, you live here in the city?
A. Yes.
Q. And are in the regular practice of medicine and surgery?
A. Yes, sir.

Mr. JOHNSON: Qualifications admitted as a regular practitioner.
Mr. JANES: We admit his qualifications.

Q. Doctor, are you acquainted with Harry Otos, the plaintiff?
A. Yes, sir.
Q. Did you see him last April, 1913?
A. Yes.
Q. At Minneapolis?
A. Yes.
Q. Did you examine the stump of his leg at that time?
A. I did.
Q. I wish you would state to the jury the condition in which you found it at that time.
A. At that time the stump of the leg——
(Question read to witness.)
A. At that time the stump was very red, and had a number of raw places on it, a number of old ulcers, that is, places that were scabbed over, and places where pus was running out.

142 Q. And did you examine and are you able to state the condition of his leg as to the kind of skin the- was on the stump?

Mr. JANES: We admit that, that there is no true skin on the end of the stump, that there is grafted skin.

WITNESS: Grafted skin and scar tissue. .
Q. Now, doctor, tell the jury the difference between scar tissue and true skin as to its resisting power, as well as the difference between grafted skin and true skin as to its resisting power and its effect upon the stump?
A. The stump had to be covered with pieces of transplanted skin, and that skin is never so resistant to pressure or any such things as true skin, and the places in between the grafts were filled in with what we call scar tissue, and that is even of less resistance. It is even of less power to stand wear and tear than grafted skin.
Q. Doctor, did you examine Mr. Otos's back last spring?
A. I did.
Q. State to the jury the condition in which you found his back?
A. I found a great deal of tenderness all along the spinal column, and most marked in what they call the small of the back, that is, the lumbar region. There was tenderness not only over the spine but over the place w-ere the spine joins the pelvic bone, that is, where

the lower bone of the spine is joined on to the hips, we will say; and all over that area the muscles were in a state of contraction.

Q. Doctor, did you examine his sexual organs?

143 A. I made a number of tests to see whether he was impotent, as he claimed.

Q. What was the result of those tests and what did they indicate to you at that time?

A. I made what we call the cremasteric test. Shall I explain that?

Q. That was explained by Dr. Scheldrup yesterday, was it?

A. He named it, only.

Q. Well, if you will explain it to the jury?

A. Simply, you irritate the skin at the upper part of the thigh, and if the nerves that govern the testicles and the penis are all in perfect order, are in working order, the testicle draws up, that is by contraction of a certain involuntary muscle, that is in the sack. Any little irritation here causes that to pull up like that on the side where the irritation is produced.

Also we made what is called the bulbar reflex: As you grasp the foreskin and pull it that way so as to irritate the prepuce, and then with the other hand test whether there is a contraction at the base of the penis. I tried that a number of times, and pretty hard, and there was no action, no resistance.

Q. No reflex?

A. No reflex.

Q. That is indicative of what?

A. That shows that there is some interruption of the course of the nerves that go from the penis to the cord and back again, or to various plexuses.

Q. As to the pudic nerve, that Dr. Scheldrup testified to, what do you say about that, its function and its condition in this man?

144 A. The pudic nerve is a sensory motor to the penis and to the muscles of it, and this nerve was very sore, inflamed and tender.

Q. Now, doctor, did you examine it again yesterday?

A. Yes.

Q. Applying the same test.

A. Yes.

Q. With what results, the same or different?

A. I will have to correct my testimony: I didn't examine the pudic nerve last spring in the other test.

Q. I mean, did you make tests yesterday?

A. Yes, I made the same tests.

Q. Same tests that you made in April?

A. Yes, except one more test, that is the pudic nerve test I made yesterday.

Q. But the other two tests, the bulbar test and the cremasteric, you made those two last spring and also yesterday?

A. Yes.

Q. You may state to the jury what results those tests showed as to being similar or different?

A. The parts were what we might call dead to that impulse, both last spring and yesterday when I examined him.

Q. You may state whether or not that was indicative of impotence?

A. That proves it.

Q. Doctor Kerns, assuming that since the injury the plaintiff here hasn't had an erection or copulated, or had sexual intercourse with his wife, you may state whether or not, coupled with the tests
145 you have made, whether you are able to express an opinion whether this condition of impotence is permanent or temporary?

A. Permanent.

WITNESS: That included the fact that I tested it last spring and again yesterday?

Q. Yes. Are you reasonably certain of that?

Objected to as leading. Objection overruled.

A. Yes.

Q. Doctor Kerns, did you examine that man's back as to the condition of his back,—and you have also heard the testimony of the plaintiff on the stand?

A. Yes.

Q. And heard the testimony as to the nature of his accident?

A. Yes.

Q. You made an examination of his back last spring?

A. Yes.

Q. And also yesterday?

A. Yes.

Q. You may state to the jury whether or not there was any improvement that you could find from the examination last spring and now, as to the condition of his back?

A. Not any.

Q. Taking those facts into consideration, that he was injured in September, the 11th, 1912; that since that time he has suffered pain in the sacral region of his back; that he sustained a severe amputation of the left leg at the point which the testimony shows, near the hip-joint; and that since that time he has suffered intermit-
146 tently with pain in the back, and together with the tests you have made are you able to express an opinion as to whether or not that injury to the sacral region of the back is temporary or permanent?

A. Permanent.

Mr. LENDE: Yes or no.

A. Yes.

Q. You may state to the jury whether it is permanent or temporary in your opinion.

A. Permanent.

Q. Doctor Kerns, are you reasonably certain of that fact?

A. Yes.

Q. Doctor, with reference to the nerves which center in the leg,

I will ask you to state to the jury what nerves center in the stump *that* are now affected by or imbedded in the scar tissue?

A. You mean center? You don't mean center?

Q. That terminate?

A. Well, there is a filament of the external cutaneous, the anterior crural, a few filaments of the ilio-inguinal, the genitocrural, and the great and lessor sciatic nerves.

Q. Those nerves, as I understand it, are made up of a great number of little fibers like threads, are they?

A. Yes,—these are nerve trunks, strictly speaking.

Q. You may state whether there are a number of them imbedded in the scar tissue?

A. Yes, there is one of them that has a distinct tumor on the end of it.

Q. Nerve tumor?

147 A. Nerve tumor.

Q. Describe the nerve tumor to the jury, its effect upon a person as to giving pain or not.

A. This nerve tumor is caused by irritation on the end of a nerve, due to scar tissue, or due to infection that occurred when the leg was amputated, and by reason of this irritation the nerve grows, and finally forms a lump at the end that is very tender and very painful. The lump in this case is about as big as your thumb nail,—or as big as the middle finger nail.

Q. Doctor, did you take his temperature yesterday?

A. Yes.

Q. What did you find as to that?

A. He had a slight fever, 99 3-10.

Q. Did you also examine the urine?

A. Yes. Well, I will say that I didn't directly examine the urine.

Q. Were you present when it was?

A. Well, no, the examination was kind of joint, Dr. Scheldrup and Dr. Jacobs attended to that.

Q. Did you take his blood pressure?

A. I did.

Q. Well, what did you find there?

A. His blood pressure is 120.

Q. Practically normal?

A. Just about right for a man of his age.

No cross-examination.

OLGA OTOS, was called as a witness on behalf of the plaintiff and duly sworn.

148 Direct examination.

By Mr. DAVIS:

Q. Your name is Mrs. Harry Otos?

A. Yes, sir.

Q. You are the wife of the plaintiff?

A. Yes, sir.
Q. When were you married?
A. June 16, 1912.
Q. You have one little child?
A. Yes.
Q. You were living with your husband at the time of his injury, that is, you were living in Willmar, and had been marr-ed at the time of his injury?
A. Yes, sir.
Q. And after he left the hospital I believe he came to your father-in-law's house, his father's home?
A. Yes.
Q. And you staid there with him?
A. Yes, sir.
Q. Who attended your husband after Thanksgiving Day, 1912, and who has been attending him since that time up to the present time?
A. I have.
Q. You may state to the jury the condition of his sleeping and his general health before he was hurt, was it good?
A. Yes, sir, it was.
Q. Since that time, since he has been injured, how has his sleep been, tell the jury?
A. He has been sleeping very restless, he can't hardly sleep at all.
Q. As to whether or not has evidenced any signs of pain
149 since this injury, you may state to the jury?
A. Yes, sir, he has had severe pains.
Q. Are you still attending to him?
A. Yes, sir.
Q. I will ask you to state to the jury whether or not since he has been injured, what has been his condition of health as to being on his back?
A. What is that?
Q. What has been his condition as to being confined to his bed?
A. He has been in bed all the time.

No cross-examination.
Plaintiff Rests.
Mr. Lende opened the defendant's case to the jury.

W. P. WHITTEN, was called as a witness on behalf of the defendant and duly sworn.

Direct examination.

By Mr. JOHNSON as follows:

Q. Where do you live, Mr. Whitten?
A. White Bear Lake, Minnesota.
Q. How long have you resided here?
A. Nine years.
Q. What is your position with the defendant company.

A. Assistant civil engineer in the civil engineering department of the Great Northern Railroad Company.

Q. How long have held that office?

150 A. I have held it for 21 years, that is, I have been in their employ for 21 years in different positions.

Q. Are you familiar with the method of construction, size and position of guard-rails in use on the Great Northern Railroad in September, 1912?

A. Yes, sir.

Q. Calling your attention to defendant's Exhibit 1 here, state to the jury what that is?

A. That is a full-sized, scaled model of the guard-rail in the east end of the yard at Willmar, Minnesota, between switch-stands 5 and 6, and a portion of the north main line track,—or a model of a portion of the north main line track, as measured by myself, and made under my directions in the shops of the Great Northern Railroad Company in St. Paul.

Q. Are you familiar with and do you know what the standard guard-rail in use by the Great Northern Railroad Company in September, 1912, was?

A. I do, yes, sir.

Q. Do you know its size and its location with reference to the main rail?

A. I do, yes, sir.

Q. When was that standard adopted by the Great Northern Railroad?

A. In April, 1907.

Q. Has it been in use ever since?

A. It has, yes, sir.

Q. What is the length of the guard-rail?

A. Fifteen feet.

Q. What was the nature of the blocking in the guard-

151 rail of the standard you have described?

A. It consists of a cast-iron blocking 15 inches in length at the end of the guard-rail, as shown in the model now before the court, and also of interior blocking of smaller blocks, as shown on the model.

Q. Indicate to the jury where the blocking is that you refer to?

A. (Witness indicating.) This is the blocking shown at the west end, called the guard-rail section, 15 inches in length, and similar blocking shown at the east end of the same length. And then intermediate between those two points are smaller blocking, six inches in length, one being located five feet from the east end and one being located five feet from the west end. Those are made out of cast-iron.

Q. What is the purpose of the blocking?

A. The purpose of a blocking is two-fold: To hold the guard-rail in rigid connection with the main line rail, at a distance in the center section of one and seven-eighths inches, in order that the wheels of the trucks may be kept away from the point of the frog and ride safely over the frog, that the wheels may not take the

wrong side of the frog. And at the ends there is also an additional safeguard for train men, for their protection at the end of the guard-rail.

Q. Do you know, Mr. Whitten, whether this standard guard-rail has been approved by the Railroad and Warehouse Commission of this state?

Mr. DAVIS: Objected to as incompetent, irrelevant, immaterial, not the best evidence, and no foundation laid. If the court
152 please, there is nothing in the record so far to show that the guard-rail upon which this man was hurt is in the same condition as this guard-rail at all; there is no evidence tending to show that the guard-rail from which this pattern was taken is the guard-rail on which this man was injured.

Mr. JANES: That has been admitted by himself and the other witnesses, that it appeared to have been in the same condition and looks the same as this guard-rail and the main rail shown here.

COURT: There may be some lack of foundation.

Mr. DAVIS: I think it is immaterial anyway, whether it is approved or not approved, the question is whether it is a standard guard-rail such as is commonly used by railroads, and whether it has been approved or not approved would not be in issue. If the Court please, if we tried to show that it was disproved, the court wouldn't allow that because the issue on the evidence would be whether it was a reasonable compliance.

Mr. JANES: This question was simply directed to whether or not this Exhibit 1 shows the standard guard-rail that has been approved by the Commission, and of course we will have to follow this up by showing that this is a duplication of the rails, and guard-rail, as it existed at Willmar at the time in question. Of course the court has got to take notice of the fact that the Railroad and Warehouse Commission of this state has jurisdiction of these matters.

Mr. DAVIS: We will object as immaterial and not within the issues of this case.

COURT: I am not familiar with the rules, or rule, if one
153 exists, making the determination of the Railroad and Warehouse Commission on that question conclusive as to anybody, or establishing what is right or wrong.

Mr. JANES: These questions are all subject to come under the jurisdiction of the Railroad and Warehouse Commission of this state. These guard-rails have existed in the State for five years.

COURT: The nature and size of rails, switches and guard rails?

Mr. JANES: And the safety appliances used in connection with them all come under the jurisdiction of the Railroad and Warehouse Commission, and it becomes a part of their duty to see that they are in proper condition, and the court must take judicial notice of that statute.

COURT: I may take judicial notice of it, but I think that if such a rule exists here I will have to ask counsel to direct my attention to it.

Mr. JANES: I am speaking of the general power of the Railroad Commission, and I simply call the court's attention to the duties

of the Railroad and Warehouse Commission as defined by the statute.

COURT: I don't know that the Railroad and Warehouse Commission takes notice of the way the companies construct their tracks, or the kind of tracks or switches they maintain in Willmar or any other town. I say if you can show me that they have notice of it or approve of it, of the character of the rails and switches, I will fall in with that idea because I think it might be proper to show that they had approved of it.

Mr. JANES: Of course this witness should state that he
154 knows,—the question is asked whether he knows that this has been approved by the Commission.

Mr. DAVIS: Nothing to show that the Commission has any authority to approve it, and nothing to show that it is immaterial.

COURT: And then the question would rest as to how he knows.

Mr. DAVIS: Objected to as not the best evidence, no foundation laid, the witness hasn't shown himself competent to testify.

COURT: I will tentatively and for the time being sustain that objection, subject, however, to the right of counsel to convince me of my error, if I am mistaken in my view. I don't know but what the question was in two different branches, that there were perhaps several questions involved in that.

(Last question read.)

COURT: Very well, I will let the ruling stand.

Objection sustained. Exception by defendant.

Mr. JANES: I offer to prove by this witness that defendant's Exhibit 1 is a model of the standard guard-rail showing the blocking and the distance of the guard-rail from the main-rail, as it is used along the great Northern Railroad lines in this state.

And further we will offer to prove that this is a model of the distance of the guard-rail from the main-rail and the blocking, the method of protecting the openings between the guard-rail and the main-rail is standard, that it has been approved by the Railroad and Warehouse Commission of this state and is used along
155 the entire system of the Great Northern Railway Company in the state of Minnesota and has been for five years last past, with the approval of the Railroad and Warehouse Commission.

Mr. DAVIS: No objection, go ahead, rather than have any chance of error we will not object, go ahead.

Q. You may answer that question, is that a fact?

(Question read.)

Mr. DAVIS: Answer by yes or no, please.

A. As far as the approval of the Railroad and Warehouse Commission——

Mr. DAVIS: Please answer by yes or no, whether you do know or not?

A. It is a rather difficult question to answer without making an explanation.

Mr. DAVIS: I suggest to the court that it readily can be answered by yes or no, as to whether he knows or not.

Q. Whether you know or not?
A. Yes.
Q. Well, is it?
A. Yes, sir.
Q. I understood you to say that the purpose of the guard-rail is to make sure that the wheels will stay on the main-rail?
A. It is, yes, sir.
Q. Just explain to the jury how it does that?

Mr. DAVIS: I think that is immaterial, as to keeping a train on the main-rail, there is nothing in the case, no issue in that.
COURT: Overruled. You may explain it while counsel is discussing the propriety of it.

156 A. At the center point of this guard-rail section, on the other track, four feet and eight inches away, there is a point, a wedged point, called the frog, comes almost to a sharp point, and without the guard-rail to hold the wheels on the main line track, it would be a very easy matter for the wheels to take, as I say, the wrong side of the frog. That is, they would strike the point of the frog and go one way as well as the other. On account of being wedge-shaped this guard-rail brings the wheels over on the right side of the frog by holding both wheels on the axle at a proper distance so that they will ride the frog on the other rail without derailing the train. And that is the reason that this is bolted and braced very thoroughly to assist in keeping the wheels on the right rail and on the track.
Q. Why aren't blocks higher, why don't they come up higher than they do?
A. Because it becomes necessary to provide proper flange-way for the wheels, the flange of the wheels in running through this guard-rail between the guard-rail and the main line rail. It requires one inch and seven-eighths of depth of wheel to provide for the flange-way.
Q. The jurors aren't all railroad men anyway, I would like to have you tell them what you mean by flangeway, that has to go down in there?
A. The face of the wheel is resting, of course, on this main line rail, and the flange is down in between the main line rail and the guard-rail, for a distance on a new wheel of one and seven-eighths inches, so that the flange, or the cutting edge of this wheel is
157 right along on the north side of this rail, when it strikes these where these blockings, cast-iron blocks, are, they must have sufficient clearance for the flange of the wheel to clear the top of these blocks, otherwise the car would be derailed.
Q. I wish you would give the jury the distance between the guard-rail and the main rail at the inner end of the blocks and also at these smaller blocks in from the ends, or stays?
A. At the inner edge of the blocks the distance is three inches; at the smaller blocks the distance is one and seven-eighths inches, which is the standard size.

Q. By the smaller blocks or stays you mean the point here on Exhibit 1, designated by a red cross, as one of them?

A. Yes.

Q. State, if you know, why that space is left between the guard-rail and the main rail?

A. To provide proper clearance distance for the wheel.

Cross-examination.

By Mr. DAVIS:

Q. You were not present and never examined the particular guard-rail upon which Harry Otos was injured previous to his injury, was you?

A. No, sir.

Q. And you don't know of your own knowledge as to its condition at that time, do you?

A. No, sir.

Q. You don't know whether these blockings in between these shown upon Exhibit 1 in the center, the small blockings, were there or not, or missing at that time, do you?

158 A. Only as——

Q. I say, do you know of your own knowledge only, or whether they have been put in since?

A. Only as shown by the photographs, which I understand is introduced in this case.

Q. Will you point out to the jury anywhere on that photograph if you can, and show them where the blocks appear, these two?

A. The west block is shown——

Q. If you will make a pencil mark on there,—this is a rail here, is it not?

A. Yes, sir.

Q. On that rail?

A. Yes, sir. (Witness does so.) X?

Q. Yes, X is all right for that.

A. At the point marked X is shown casting at the west end of the guard-rail.

Q. That is a small one?

A. That is a large one.

Q. I am speaking of the small one, not the large one.

A. The next one is shown by two crosses, XX, it would be the next one farther west.

Q. Show the next one with the letter Y.

A. Next one would be shown by the letter Y (indicating with a Y).

Q. And the next one?

A. The next one by letter Z (so indicating).

Q. That is the last one?

A. Yes, that is the last one, at the extreme east end.

Q. You have shown as you recollect it, on this photograph, where these two small, what do you call them, blockings, appear, have you?

159 A. Yes, sir, I have.

Q. Upon the original, Exhibit 1, I will ask you to state if the blocking, the first blocking from the west end of this model, how far it is from the west end,—the first block.

A. It is five feet and three inches.

Q. I will ask you to state how far from the end of Exhibit 1, the first block is from the east end.

A. Five feet and three inches.

Q. Same distance?

A. Yes, sir.

Q. You are certain of that?

A. Yes, sir.

Q. You measured it down at Willmar?

A. I did, yes, sir.

Q. Then, as I understand you, the first small blocking from the west end would appear upon this model as exactly the same distance from the west end as the one small blocking at the east end would appear from the east end?

A. On the model, yes, sir.

Q. Mr. Witten, when was the first time you observed this track to know it,—who pointed it out to you?

A. Mr. Olson.

Q. Mr. Olson?

A. Yes, sir.

By Mr. JOHNSON:

Q. Mr. Olson is the section foreman?

A. Yes.

PAUL M. LONG, was called as a witness on behalf of the defendant and duly sworn.

160 Direct examination.

By Mr. JOHNSON as follows:

Q. Where do you live, Mr. Long?

A. Willmar, Minnesota.

Q. How long have you resided there?

A. About four years, possibly a little longer.

Q. Where did you reside before that time?

A. Everett, Washington.

Q. What position do you hold with the defendant company at Willmar?

A. I am yardmaster.

Q. How long have you held that position?

A. About 13 years.

Q. At Willmar?

A. No, sir, about 13 years with the Great Northern.

Mr. JANES: 13 years on the Great Northern, at various places.

Q. You have been yardmaster at Willmar for four years?

A. Yes, sir, a little over.

Q. Do you know the plaintiff, Mr. Otos?
A. Yes, sir.
Q. And did you know him at the time of his injury?
A. Yes, sir.
Q. Were you at that time in the service of the defendant as yardmaster? ?
A. Yes, sir.
Q. At Willmar?
A. Yes, sir.
Q. Tell the jury what your duties are as yardmaster?
161 A. Why, I have supervision of the making up of trains and ordering them,—handling of the orders that are issued to switch-engine foremen.
Q. What is the first thing that takes place, as far as you are concerned, when a train arrives at Willmar?
A. Why, the conductor delivers the bills and the list at my office.
Q. What kind of a list?
A. What we call a switch-list.
Q. What do you mean by the bills?
A. The bills are way-bills for the loads in the train that he brings in.
Q. What do you do with them?
A. One of my clerks checks these way-bills against the switch-list that he brings into the office, and I deliver the switch-list to the foreman, or have it delivered, to the foreman of the switch-engine.
Q. That was the position that Mr. Otos held that day?
A. Yes, sir.
Q. Switch-foreman or foreman of the switch-engine. What is the duty of the car-inspector when a train arrives?
A. He looks over the cars to ascertain whether they are all safe to go forward, out of the yard, to find what defects there are on them. When he finds a defect on it, he places a card on the car, at each end of it.
Q. What kind of a card?
A. Why, what we call a repair-track card, this small green card.
162 Q. I show you Defendant's Exhibit 2, is that the kind of a card?
A. Yes, sir.
Q. And then what is done?
A. The switch-foreman switches this car out of the train and places it on the track ready to be taken to the bad-order track.
Q. Explain to the jury the way that tracks are arranged for the day, and how the bad-order track is designated and by whom?
A. We have 17 tracks in our yard. In the morning I make a list out to the foreman of the then switch-engine, designating on which of these tracks they will place the different cars, going in different directions and for different industries. Among them tracks I designate a track where they place all bad-order cars.
Q. Now, as I understand it, the conductor that comes in gives

you a list, a switch-list, or a list of the cars, showing what they contain and where they are going?

A. Yes.

Q. You give that to the foreman of the switch-engine?

A. Yes, sir.

Q. Now, then, what does the foreman of the switch-engine do?

A. He switches these cars out and puts them on their proper tracks which has been designated to him.

Q. Do you know whether or not it is customary for them, or was it at this time, to mark the cars with chalk-marks?

163 A. The foremen generally mark all their cars with chalk-marks that are working in Willmar yards.

Q. For what purpose?

A. Why, it makes it easier for them to do their work.

Q. Easier for whom?

A. For the foreman.

Q. Why does it?

A. Well, it gives him the destination, shows him the destination on the side of the car, without looking at their list all the time.

Q. Where do they get this chalk?

A. We furnish that to them from the office.

Q. Mr. Long, I show you Plaintiff's Exhibit C, and call your attention to the chalk marks in the lower part of the side of the car, and towards the corner there. I will ask you what those chalk-marks signify?

Mr. DAVIS: If you know.

Q. If you know, of course?

A. The only mark I can make out distinctly is a round mark there——

Mr. DAVIS: Objected to as incompetent, irrelevant, immaterial, no foundation laid; there is no evidence tending to show when that mark was put on there, nor whether it was put on previous to this injury.

Mr. JANES: It was on this car the next day; we ought to be permitted to identify those marks there, and then the question would be to show when they were put there. The evidence already shows that the switch foreman, who was this plaintiff, puts these

164 marks on his cars for his convenience, and that is customary for him so to do, and he has testified that he marked the cars sometimes.

COURT: I think, counsel, I will sustain the objection.

Mr. JANES: Exception.

Q. Mr. Long, I believe you stated that you were on duty and in this service as yardmaster on the date of this injury?

A. Yes, sir.

Q. Did you or did you not handle this train in the same manner as you have described it was your custom to handle other trains?

A. Yes, sir.

Mr. DAVIS: Objected to as incompetent, irrelevant, immaterial, and also leading, and not an issue in the case.

COURT: It is objectionable on that ground but I will permit the question to be answered, I will overrule it.

Q. Now, I may repeat here but I don't recollect; What do you do with the switch-list after you have obtained it?

A. I deliver them to the foreman of the switch-engine, or cause them to be delivered.

Q. I will show you Defendant's Exhibit 3 and ask you what that is?

A. That is a switch-list of a train.

Q. When you deliver those switch-lists are there any marks in this column, over which the word "Seals" appears to the right of the list?

A. There are sometimes marks there.

Q. And who puts those markings on?

A. The clerk in the office sometimes.

165 Q. In this column or in that (indicating)?

Mr. DAVIS: Well, he said in that one.

Mr. LENDE: Which is this and which is that?

Q. Are there ever any bad-order check marks in that column when you turn it over?

A. No, sir.

Mr. DAVIS: Objected to as incompetent, irrelevant, immaterial, and I ask that the answer be stricken out until I object, then, your honor.

COURT: Well, it may be stricken out, because it was answered before counsel had an opportunity to object.

(Question read.)

Mr. DAVIS: No objection.

Q. Mr. Long, calling your attention to these check marks in the column under the word "Seals" here, B. O., in different places, what does that denote?

A. It denotes the cars that is opposite that are bad order.

Q. Calling your attention to this car, 125896, I will ask you whether or not you turned this list over to the switch-foreman?

A. Yes, sir.

Q. Who was the switch-foreman?

A. Harry Otos.

Q. Calling your attention to the letters in the margin opposite the number of the car 125896, in the column under the word "Seals," what does that signify?

A. It signifies that the car was bad order.

Q. And when the car was in that condition and so noted

166 on this list, I will ask you whether or not that was on the card—that B. O. opposite the number of that car was on the switch-list when you turned it over to Mr. Otos?

A. No, sir.

Q. Now, then, when that car is in a defective condition and a bad-order check mark placed opposite that car, what is it the duty of the switch-foreman to do with the car?

A. To put the car on the track designated for bad-order *tracks* (cars).

Q. Mr. Long, I will show you Defendant's Exhibit 4, and ask you what that is?

A. That is a book of rules that covers the operation of trains on the Great Northern.

Q. State whether or not those books of rules are furnished to the employees of that company?

A. Yes, sir.

Q. State whether or not they are required to inform themselves of these rules so that they can pass an examination before they enter the service,—and you say you were there in service——

A. Yes, sir.

Q. Calling your special attention to paragraph on page 66 designated "B," I will ask you whether or not one of the rules provide that an employee should not go between the cars when——

Mr. DAVIS: I object to counsel stating the contents of that document.

Mr. JANES: There is no question pending yet, may it please the Court.

COURT: I think that objection is proper. You may direct his attention to that paragraph, and without stating the substance of it or undertaking to state what it recites, you may ask him and
167 inquire of him with respect to it.

Q. Just read that rule over to yourself. (Witness reads book Exhibit 4.)

COURT: He had read it, counsel.

Q. Now, what does that rule provide?

Recess.

(Question withdrawn.)

Q. Calling your attention to subdivision B of paragraph 306, on page 66 of Defendant's Exhibit 4, I will ask you to state whether or not that was a rule of the company in force at the time of this accident?

Mr. DAVIS: Objected to as incompetent, irrelevant, immaterial, and not within the issues.

Mr. JANES: Refreshing the Court's mind, the plaintiff admitted that he was familiar with the rule book.

COURT: I think I will permit the question to be answered. Objection overruled.

Q. You may answer?

A. Yes, sir.

Mr. JOHNSON: I offer Exhibit 4 in evidence, with special reference to subdivision and paragraph indicated and referred to.

Mr. DAVIS: Objected to as incompetent, irrelevant, immaterial, and not within the issues.

COURT: Well, it may not have a bearing on all of the issues, but I think that I will overrule the objection and admit the exhibit.

Mr. DAVIS: As having a bearing on some of the issues?

COURT: Yes.

168 Mr. JOHNSON: Gentlemen, I will read you the portion referred to: "B. Great care must be exercised in coupling and uncoupling cars. Employes when adjusting knuckles and couplers must only do so when cars to be coupled are standing and never when either of the cars to be coupled is moving."

COURT: I don't know but what I have made a mistake in receiving that. Probably the first sentence is merely directory, but I don't know the significance of those,—I am not sufficiently familiar with railroad work to know what you mean by adjusting knuckles and couplers.

Mr. MICHEL: There is no evidence on that.

COURT: I say, I make that suggestion upon re-examination of that.

Mr. JOHNSON: I offer in evidence defendant's Exhibit 5, being a postal card referred to this morning, and which card Mr. Otos testified he was familiar with, on cross-examination.

Mr. DAVIS: In view of the offer of Exhibit 5, I now ask the Court to strike out the rule stated here, and object to it as incompetent, irrelevant, immaterial,—before the court rules on Exhibit 5. I desire the court to strike out that portion that was read to the jury, a sub-division of rule 306.

Mr. JANES: Exhibit 5 includes the printed notice on both sides.

COURT: I think that I would be justified in striking out and changing the ruling under which the rule book was received, because I don't think there is any evidence in the case to justify the court in holding that adjusting couplers, or the language there
169 used, signifies coupling or uncoupling, and the motion to strike out that is granted.

Mr. DAVIS: Exhibit 5 is objected to as incompetent, irrelevant, immaterial, and no foundation laid.

COURT: Objection overruled.

Exception.

Exhibit 5 was read to the jury and into the record as follows:

Mr. JOHNSON (reading): Great Northern Railway Company. I have received and read the fol-owing "special notice," and understand it thoroughly.

Special Notice.

"Employes are forbidden to step in front of or go between moving cars for the purpose of coupling or uncoupling same, or adjusting the coupling apparatus thereon. In all cases when coupling cars, employes will open the knuckle on the stationary car, and in uncoupling same, if the nearest lever refuses to work, employes will use the lever on the other car. All adjustments of coupling apparatus must be made while the cars are standing still, and not when in motion."

Mr. DAVIS: I object to that latter part, "all adjustments," as immaterial.

COURT: I think that would have no bearing in this case. That clearly supports me in my position that coupling and adjusting are two different things. Of course that has no bearing, I don't see that it is very material, whether you read it all, it has no bearing.

Mr. JOHNSON: We will mark the part that is not admitted, with brackets.

COURT: Counsel, I wouldn't say that you may not put it
170 all in, but that part isn't relevant at all, it may all go in.

Mr. DAVIS: We withdraw the objection, go ahead and read it, to save time.

Mr. JOHNSON (reading): "N. B. This notice is additional to the book of rules, bulletins, and other instructions, and does not rescind, cancel or modify the same. Dated Sept. 15, 1907."

"Name ——. Occupation ——. Residence ——.

"Sign and return."

Q. When was the first time you saw Exhibit 3?

A. When the conductor arrived at the yard office.

Q. When?

A. Around 5:15 or 30.

Q. What day?

A. The day of the accident.

Q. What conductor was that?

A. Conductor Le Suer.

Q. I believe you did testify that you gave it to the plaintiff?

A. What?

Q. You did testify you gave it to the plaintiff did you, you gave it to Mr. Otos?

A. Yes, sir.

Q. After you had given it to Mr. Otos when did you next see it?

A. It was delivered to my office some time after the accident, I can't say just how long.

Q. Well, the same day or afterwards?

A. It was the same day.

Q. Now then, calling your attention again to this bad-order mark in the margin opposite the number of the car 125896, I
171 will ask you whether that was on there when the card was brought back to you?

A. Yes, sir.

Q. I will ask you whether or not Exhibit 3, barring this tear which occurred accidentally since we got into this trial, whether barring that, Exhibit 3 is now in the same condition as when it was returned to you after the accident, as you have testified to?

A. Yes.

Q. Barring of course that it may be a little dirty or something like that?

A. It is in the same condition.

Mr. JOHNSON: We offer Exhibit 3 in evidence.

Mr. DAVIS: I would like to ask one or two questions before objecting.

Q. Mr. Long, you do not know who wrote the letters B O opposite the car 125896 do you?
A. No, sir.
Q. Will you kindly take pencil and paper and write those letters yourself? (Witness does so.)
Q. You are left-handed?
A. Yes, sir.
Q. Now, Mr. Long, were you down there by the car after he was hurt?
A. Yes, sir.
Q. And saw the car?
A. Yes, sir.
Q. Did you see the switch-list there?
A. No, sir.
Q. Who handed you the switch-list?
A. Why, I don't remember.
172 Q. How long after this accident do you claim to have gotten this switch-list?
A. Oh, it was around possibly 30 or 45 minutes.
Q. Have you not stated and did you not state shortly after this accident that this list was sent to you by Harry Otos?

Mr. JOHNSON: I object to that as not proper cross-examination for the purpose of ascertaining whether this man has any knowledge of the switch-list, that is cross-examination after we get through with him.

COURT: I think that is improper. Objection sustained.

Q. Now, Mr. Long, you were down there then at the place of the accident, were you?
A. Yes, sir.
Q. You saw this car 125896 did you not?
A. Yes, sir.
Q. Looked at it?
A. Yes, sir.
Q. Did you see a bad-order tag on it, yes or no?

Mr. JANES: Objected to as not proper cross-examination for the purpose of ascertaining whether or not there is sufficient foundation laid.

COURT: Objection sustained.

Q. You don't know, Mr. Long, when the letters B O were written on that exhibit, do you?
A. No, sir.
Q. You don't know whether they were written after the accident or before, do you, of your own knowledge?
A. They were written between the time I delivered that list and the time I received it back.
173 Q. I say, you don't know as a matter of fact whether it was written before or after he was hurt, do you?

A. No, sir.
Q. Who handed it to you?
A. I told you I didn't know.
Q. You have no recollection of it?
A. I have a faint recollection.
Q. Who was it?
A. A Greek section-foreman.
Q. Palovada?
A. I don't know his name, I wouldn't swear that it was he.
Q. That is your best recollection is it?
A. It was somebody brought it to me.
Q. How long did you keep it in your possession?
A. I don't remember.
Q. When did you let go of it?
A. I think the clerk of the superintendent's office came there and asked for it, I don't know just when it was, I couldn't say.
Q. You were present at the trial in Minneapolis at the trial of this boy's case, were you not?
A. No, sir.
Q. You weren't there?
A. No, sir.
Q. When was the first time now, can you give us any definite idea of when this list went out of your possession?
A. Oh, it was sometime shortly after the accident, I couldn't say the exact time, or the number of hours.
Q. It went out of your possession, I say?
174 A. Yes, I say.
Q. Well, did it go out of your possession on that day, that same day?
A. I couldn't say whether he got it immediately or not.
Q. That same day?
A. I couldn't say.
Q. How long after the accident?
A. I couldn't say how long, I don't remember.
Q. You don't know?
A. I don't remember.

Mr. JANES: May it please the court, I don't think that is proper examination.

Q. Do you think it was inside of 24 hours?
A. It might have been 30 minutes.

Mr. DAVIS: I object to the exhibit on the ground that there is no foundation laid, there is no evidence tending to show when these letters were put on.

COURT: Objection sustained.

Mr. JANES: But, Your Honor, we have shown that that is the switch-list given to Mr. Otos at the time.

COURT: It is in reference to that card, the marking opposite, there is no evidence as to these letters, no foundation laid.

Mr. JANES: Mr. Otos testified that he would not state that this wasn't the switch-list that he received.

COURT: I don't know that there is any question but what it is the switch-list he received; but the question is when those markings were put on there. It surely, counsel, can't be claimed that there is any foundation laid for receiving it in its present condition, especially in view of the testimony of the witness that he doesn't know up to this time, and there is no evidence in the case indicating that anybody knows when those markings were put on,—is there?

Mr. DAVIS: Not a word, I don't know of anything.

Mr. JANES: The evidence in this case also shows who puts these marks there in the course of his duty, that has been testified to, and what is customary to do, and that shows that it is the switch-foreman who does that. Now, then, the presumption is of course that these letters B O were put on there by the man whose duty it was to put them on there.

COURT: You haven't shown that that is his handwriting, have you? Oh, counsel, I think I will sustain the objection, and must.

Mr. JANES: Exception.

Cross-examination.

By Mr. DAVIS:

Q. Mr. Long, you were down there to that car, were you?

A. Yes, sir.

Q. You saw it and looked at it, did you?

A. Yes, sir.

Q. State to the jury when you looked at it whether there was any bad-order tag on it?

Mr. JOHNSON: Objected to as not proper cross-examination.

COURT: Sustained.

Mr. DAVIS: Ah, ha, all right, that is all.

Q. Have you any duty as yardmaster with regard to observing the condition of cars in that yard?

A. What is that?

Q. Have you any duties as yardmaster with reference to observing the condition of cars in the yards at Willmar?

A. When I know there is a car that is bad-order it isn't supposed to go out of the yard until it is repaired.

Q. Is that a part of your duty?

A. To see that it doesn't go out, not to examine it.

Q. But when you observe a car that is marked bad order, it is then your duty to see that it doesn't go out?

A. Yes.

Q. Now, I will ask you if it is not a fact that when you went down there when Harry Otos was hurt, that there was no repair tag on that car?

Mr. JOHNSON: Objected to as not proper cross-examination.

Mr. DAVIS: Question withdrawn.

TORGER SLETTEN was called as a witness on behalf of the defendant and duly sworn.

Direct examination.

By Mr. JOHNSON as follows:

Q. Mr. Sletten, where do you live?
A. Willmar.
Q. How long have you lived there?
A. About seven years.
177 Q. What position do you hold with the defendant company at Willmar?
A. Car-inspector.
Q. How long have you held that position?
A. About five years.
Q. You were engaged as such at the time of the accident or injury that happened to the plaintiff, as testified to in this case?
A. Yes.
Q. You recollect that injury?
A. Yes.
Q. As car inspector what is it your duty to do when a train arrives in the yards at Willmar?
A. Look the cars over and see if they are in good running order.
Q. You have heard the testimony relative to car 125896?
A. Yes.
Q. Testified to by plaintiff, where the pin-lifter was gone?
A. Yes, sir.
Q. State whether or not when the train in which that car was arrived in the yards at Willmar, you inspected the car and other cars in that train?
A. Well, I inspected the whole train.
Q. And this car was among them?
A. Yes.
Q. What defective condition, if any, did you find to exist with reference to this car?
A. Well, the pin-lifter was missing, the buffer-iron was broken, a couple of rivets in wrong kind of repair,—wrong repair.
Q. Explain to the jury and the rest of us what you mean by buffer-iron being broken?
178 A. Well, it is an iron that protects the end of the car, the end sill, when they hit another car.
Q. What was the matter with the coupler?
A. Well, the rivets has been broken and he has been repaired some place with bolts in place of rivets.
Q. After you examined the car and found the condition it was in, what did you do?
A. I put a repair card on it.
Q. I show you defendant's Exhibit 2, is that the kind of a card you put on?
A. Yes, sir.
Q. How many of them?

A. Two of them.
Q. Tell the jury where you put those cards on the car?
A. On the right hand side to the step-ladder.
Q. How close to the place where the pin-lifter would have been if it had been on the car?
A. Oh, about three feet.
Q. You testified, I believe, that you knew of the accident at the time it happened, to Mr. Otos?
A. Yes, I knew it afterward, yes.
Q. Well, you know when it happened?
A. Well, some around six o'clock in the evening.
Q. Well, when did it happen with reference to the time that you put the cards on the car, as you testified?
A. I didn't get what you mean.
Q. What I mean is, did you put the card on the car before or after the accident?
A. Before.

Mr. JOHNSON: We offer Exhibit 2 in evidence at this time.

179 Q. You stated that was the same kind of card, I believe, that you put on?
A. Yes, sir.
Q. Same size?
A. Yes.

Mr. DAVIS: No objection.

Q. When a car is found in the condition in which you describe this car as having been found in, and you have placed the cards on as testified to, what is it customary to do with the car?
A. The car goes to the repair-track.
Q. If there is no room for it at the repair-track at the time, where does it go?
A. Well, they generally got a track, an extra track in the yard.
Q. What do you call that track?
A. Bad-order track.
Q. Was the condition of this car when you inspected it of such a nature as required it to be sent to the repair-track?
A. Yes, sir.

Mr. DAVIS: Objected to as calling for the conclusion of the witness; the facts having been shown it is for the jury to say whether it was in that condition or not.
COURT: It amounts to practically the same thing as he has testified to, I will overrule the objection, he may answer.

Cross-examination.

By Mr. DAVIS:

Q. What time did that train pull in?
A. 5:05 afternoon.
180 Q. You are sure of that?
A. Yes.

Q. What kind of an afternoon was it, dark or light, cloudy or sunshiny?
A. It was a bright day.
Q. You remember it distinctly, that it was a bright day?
A. Yes, sir.
Q. No clouds?
A. No, sir.
Q. Hadn't rained that day?
A. No, sir.
Q. Sure of that?
A. Yes, sir.
Q. Now, Mr. Sletten, you say the pin-lifter was gone?
A. Yes.
Q. You also examined the brackets around the pin-lifter, didn't you?
A. Yes, sir.
Q. You found both of them broken?
A. Yes.
Q. One an old break and one a new break, didn't you?
A. Partly new and partly old, yes.
Q. One of them was rusty break, of the brackets that held the pin-lifter to the car, was rusty wasn't it, one of the breaks?
A. Partly.
Q. Can you give this jury any idea about how old that break was, how long that bracket had been broken?

Mr. JOHNSON: Objected to as not proper cross-examination.
181 COURT: Overruled.

A. No, sir, I can't.
Q. Well, will you say it was at least a month old?

Mr. JANES: Objected to as not proper cross-examination, because we haven't offered this witness as an expert on the age of breaks.

COURT: I think it would be immaterial anyway; if it had the defects that you claim here, of course, the consequences would be the same no matter whether the effect had existed a month or 10 minutes.

Q. Mr. Sletten, you say the buffer-iron was broken?
A. Yes.
Q. You mean that iron that protects the cars from going together?
A. Protecting them from breaking up when they hit hard another car.
Q. That isn't a part of the pin-lifter?
A. Well, the pin-lifter is fastened to that iron.
Q. That was broken was it?
A. Yes, sir.
Q. On which car was the buffer iron broken?
A. 125896.
Q. It wasn't broken on the other car?
A. No, sir.
Q. And then a couple of rivets were defective?
A. Yes.

Q. In what way were they defective?
A. Well, they wasn't heavy enough.
Q. What would be the result of that?
A. Well, I don't really know.

Mr. DAVIS: Question withdrawn.

182 Q. Now, you say this train pulled in at 5:15 did it?
A. Yes, sir.
Q. How long after it pulled in before you started to inspect that train?
A. I started when they stopped.
Q. Then you started at 5:15 didn't you?
A. Yes, sir.
Q. How many cars back of the engine was this car 125896?
A. About the 7th or 8th car.
Q. 7th or 8th?
A. Yes.
Q. The engine pulled away did it?
A. Yes, he went away.
Q. He pulled away before you started to inspect?
A. No, I started before.
Q. Before the engine pulled away?
A. Yes.
Q. Now in inspecting these cars, what do you have to do, you examine the wheels do you?
A. Yes, sir.
Q. You have a hammer?
A. Yes.
Q. You test the wheels to see whether they are cracked or not, I presume?
A. Oh, they don't do that.
Q. What do you do with the hammer then?
A. We use him for to come kind of handy to look after things, and pound on it.
Q. Well, you examine each wheel don't you?
A. Yes, sir.
183 Q. You examine the flanges on the wheels?
A. Yes.
Q. What else do you examine on the car?
A. Everything.
Q. What do you mean by everything, tell the jury?
A. Well, especially the safety appliances.
Q. You examine the pin-lifter on each end of the car?
A. Yes.
Q. Examine the coupler?
A. Yes.
Q. Examine the buffer-iron?
A. Yes.
Q. Do you examine the rods underneath?
A. Yes.
Q. All of them?
A. Yes, sir.

Q. How many are there underneath?
A. Well, it is difference between the cars.
Q. The ordinary car there in the yards?
A. Seven.
Q. You examine the connections to each end of the rods, on those truss-rods underneath, do you?
A. Yes.
Q. You ascertain whether those are properly tightened or not?
A. Yes, sir.
Q. If they are not tightened, you tighten them up, if they are too loose, don't you?
A. Some places.
Q. On the first car which you examined that day was there any of those rods or bolts loose do you know, or can you remember?

184 A. No, sir.
Q. You don't remember?
A. There wasn't any.
Q. You are sure of that?
A. Yes.
Q. The second car that you examined that day, were there any truss-rods loose?
A. Well, I couldn't exactly say, but I set out a couple of cars for repair.
Q. You found car numbered 26750 did you, that was ahead of this car 125896, closer to the engine, didn't you?
A. I can't remember.
Q. Do you know what a switch-list is?
A. Yes, sir.
Q. Now, this switch-list, that would show the position of the cars to the engine, this car would be the first to the engine and this next one next closest to the engine, wouldn't it?
A. Depends which end they check up on.
Q. Whether they check up from the caboose or the other end?
A. Yes.
Q. You don't know whether they have checked from the caboose end or the other, the engine end?
A. No, sir.
Q. Did you discover any defects upon any car previous to the time you landed on car 125896, any truss rods loose?
A. No, sir.
Q. Any hand-hold loose?
A. No, sir.
Q. Any grab-iron loose?

185 A. No, sir.
Q. You examine the grab-irons?
A. Yes, sir.
Q. In examin-g the grab-iron you have to go up the car and test each grab-iron to see that it is tight?
A. Yes, sir.
Q. You did that on every car?

A. No, not on every car. You can see it on the bolts.

Q. Did you test or go up on the ladder on either side,—you go on both sides of the car to test the grab-irons don't you?

A. Yes.

Q. When you start on the side of a car do you go clear down the same side of the train, or do you examine both sides of the car, the first car first?

A. Go on one side first and then go on the other side.

Q. On which side did you start to inspect this car then, on which side of the train?

A. The north side.

Q. Then you examined the grab-iron on the north side, the truss-rods underneath, the hand-holds up above on top of the car, you examine those don't you?

A. Yes.

Q. That is a part of your duty?

A. Yes.

Q. You examined them that day?

A. Yes.

Q. You can't see them without climbing up on top can you?

A. No.

186 Q. *Do* you climb up on each car and examine the hand-hold on top that day,—didn't you?

A. No.

Q. What?

A. No, not on each car.

Q. You never climb up on each car, well, every other car, is it?

A. No. Walk over the train after you have done inspecting the rest of it.

Q. You don't start to examine the hand-holds until afterwards then?

A. Well, I mean on top.

Q. That is, the hand-holds up on top?

A. Yes, sir.

Q. How long does it take you to examine one of those cars as a rule?

A. It depends on the condition of the car.

Q. How long does it take you as a rule to examine an ordinary car?

A. Well, it takes about an hour to look over 30 cars.

Q. Then it would be two minutes to a car?

A. Yes.

Q. You examine an entire car you say in two minutes?

A. Yes, sir.

Q. This car was the 7th or 8th car back?

A. Yes, sir.

Q. Don't you know as a matter of fact that at half past five o'clock that night Harry Otos was on his way to the hospital, yes or no?

Mr. JOHNSON: Objected to as assuming a state of facts not in evidence.

COURT: Overruled.

187 Q. Your answer, sir?
A. I don't know what time it was.
Q. Don't you know, sir, that at twenty minutes after five that day Harry Otos had been run over by that train, don't you know it?
A. No, I don't exactly.
Q. Will you swear he wasn't at that time?

Mr. JOHNSON: Objected to as not proper cross-examination.
COURT: Overruled.

Q. Your answer, please.
A. What was the question?
Q. Will you swear that he wasn't hurt at 20 minutes after five that day?
A. I can't swear to it.
Q. You know that it was before six o'clock, don't you?
A. Yes, I do.
Q. And you know that it was within 5 minutes to 10 minutes after the train had pulled in, don't you, yes or no?
A. I didn't get that.
Q. Do you know that he was run over by this train within from 5 to 10 minutes after that train had pulled *it*,—don't you?
A. No, I don't.
Q. You can't tell this jury then, can you?
A. No, not exactly the time when he was run over.
Q. Had you finished inspecting this train before Harry Otos was hurt?
A. Part of it, yes.
Q. How much of it?
188 A. Well, I think they had about 12-15 cars.
Q. 12-15 cars, that would be on both sides you examined them?
A. Yes.
Q. It took you about two minutes to dispose of a car,—does it?
A. In different cases.
Q. And you had examined 12 or 15 cars on both sides of the cars before he was hurt, you claim?
A. Yes, sir.
Q. And you claim that you had put a bad-order tag on both sides of the car before he was hurt, don't you?
A. Yes, sir.
Q. You are sure of that?
A. Yes.
Q. You are sure that the train came in at 5:15 are you?
A. Close to that time, some — around 5:05 or 5:10.
Q. How do you know that?
A. I know it because I got a record of it.
Q. You got a record of that?
A. Yes, sir. Well, I got it but I lost the book now, I had it down in Minneapolis this spring, but I lost it.
Q. You lost the book, did you?
A. Yes, sir.

Q. Did you see Harry Otos when he was hurt?
A. No, sir.
Q. Where had you gone?
A. I was about fifteen car-lengths west of where the accident happened.
189 Q. You were examining cars?
A. Yes.
Q On this same train, were you?
A. I think it was on the same train, yes.
Q. Well, now, isn't it a fact, Mt. Sletten, that when a train pulls in you examine all the cars in it before the switch-engine starts to take those different cars, and take them onto the tracks?
A. They usually take a car as soon as the inspector is done with it.
Q. Then you had been working as I understand you, about from 35 to 45 minutes after the train pulled in before Harry Otos was hurt, hadn't you?

Mr. JANES: Just a minute, the witness hasn't so testified,—it is assuming that he testified to it.
Mr. DAVIS: Question withdrawn.

A. No.
Q. I will ask you if it is not a fact that you had been working from 35 to 45 minutes after the train pulled in before Harry Otos was hurt?
A. I couldn't tell about that.
Q. What is your judgment on it, how long had you been working?
A. Well, if this was a train of Great Northern cars, it won't take you more than half a minute to look over a car, because it is all new cars.
Q. You don't remember whether it was Great Northern or other cars?
A. Yes, sir, I remember.
Q. How long did it take you to examine the first car, tell the jury?
A. Well, I couldn't say that exactly, but I know it ain't took very long.
190 Q. How long?

Mr. JOHNSON: Objected to as already answered.
COURT: Objection sustained.

A. Well, I would say half a minute with a car that ain't got a defect on it, in some cases.
Q. In other words, then, you examined fifteen cars in seven minutes that day, did you, on one side?
A. I couldn't tell, I couldn't tell exactly how long a time it took.
Q. Do you mean to tell this jury that you could examine the truss-rods on those cars, all of them, the hand-holds on the side, the grab-irons, the coupling apparatus, the pin-lifters, the buffer-irons, on any one car and do it in half a minute?

M-. JANES: Objected to as assuming something that the witness

hasn't testified to; the witness hasn't testified that he examined all those things in half a minute.

COURT: Objection overruled.

A. Well, in some cases you can do it in a short time.

Q. Well, how long, you can't do it in half a minute, can you now, Mr. Sletten? It will take you more than that, won't it now, isn't that a fact?

A. Oh, not so long as the car is new and everything is in good shape.

Q. In other words, you mean to tell the jury you don't inspect it?

A. Yes.

Q. Well, then, you didn't inspect the cars that day, did you?

A. Yes, I did.

191 PATRICK J. CONWAY was called as a witness on behalf of the defendant and duly sworn.

Direct examination.

By Mr. JOHNSON:

Q. Where do you reside, Mr. Conway?

A. Willmar, Minnesota.

Q. How long have you resided there?

A. Eight years last June.

Q. What position do you hold with the defendant company?

A. Switchman in the yards there.

Q. How long have you been so employed?

A. Well, I have worked for them about eight years altogether.

Q. And were you so employed in the yards at Willmar on the day of this injury to the plaintiff?

A. Yes, sir.

Q. You were working as a switchman at this time?

A. Yes.

Q. With whom?

A. With Mr. Otos.

Q. The plaintiff?

A. —As foreman, Mr. Otos as foreman.

Q. Under his directions?

A. Yes, sir.

Q. Where were you when the accident occurred?

A. I was at number six switch, track-switch.

Q. How far was that from the place where the injury occurred?

A. About 30 feet I should judge.

192 Q. Which direction?

A. North.

Q. What side of the train was Mr. Otos on?

A. He was on the north side, on the lead side.

Q. Do you know what was being done with this car or those cars at the time of the accident?

A. Why, we was working in on six track, shoving those cars in there.

Q. What cars?
A. Those cars that he was working on.
Q. Do you recollect this particular car which has been referred to as 125896?
A. No, I don't, I don't know anything about the number of it.
Q. What we call the car with the pin-lifter gone?
A. No, I don't know what the number was because I didn't make no note of it.
Q. I say, do you recall the car with the pin-lifter gone?
A. Well, that car that he was working on, that he got run over, was there.
Q. What were you going to do with the car at that time, if you know?
A. Well, that car and the next cut was going down on number ten, 6 and 10, by the line-up that I got from Mr. Otos.
Q. 6 and 10 was the number of the tracks?
A. The next car would be going down on 10, that would be where he was making that cut.
Q. That car would go on 10?
A. The car where he went in to make the cut was going down on 10.
193 Q. You mean the car with the pin-lifter off?
A. I don't know whether the pin-lifter was gone or what was the matter with it, but that was the car he was on.
Q. You mean the car that ran over Mr. Otos?
A. Yes.
Q. Well, what was to be done with the first car that——

Mr. DAVIS: Next to the engine, you mean?

Q. No, the end car?
A. The car that was ahead of this car that ran over him?
Q. Yes.
A. Going in on six.
Q. What was to be done with this car?
A. Going down on 10 where we was holding up the bad-order cars.
Q. When you say 6 and 10 you refer to tracks?
A. Yes.
Q. As the number of tracks?
A. Yes, certainly.
Q. Why was that car going on 10?

Mr. DAVIS: Objected to as calling for the conclusion of the witness.

COURT: I presume it is, counsel, but I will overrule the objection.

Mr. DAVIS: There is no evidence he got any orders of that kind from the plaintiff.

(Question read.)

COURT: If you know, you may state.

A. I know by the line-up from the foreman, holding those bad-orders onto 10, we had some others previous to this time.

194 Q. Who informed you that that car should go on 10?
A. The foreman, Mr. Otos.
Q. What was that track 10 used for that day?
A. We were using that for holding bad orders up to that time.
Q. How did you speak of that track, how did you designate it?
A. Why, I got that from him and the line-up from him.
Q. I know, but how did you refer to that track, I mean, what did you call it?
A. Well, it is the track that we was holding up those bad orders there.
Q. Is it the track that you refer to as the bad-order track?
A. Well, we were holding them up there at that time.
Q. How did he inform you of the fact that that car was going to be cut down on 10?
A. He came out on the lead with a drag of cars, and he gives the helpers the line-up of where he wants those cars to go.
Q. How does he do that?
A. He does it—speaks it to us, tells us, and we takes one or two or whatever cars may be off from the cars that we are working on, and commence to switch them where they should go.
Q. What was the numbers that he used in giving you this line-up?
A. That was the line-up we had, 6 and 10.
Q. He said 6 and 10 and that meant what?
A. That meant 6 and 10, I was to switch 6.
Q. One car on 6?
195 A. And the next cut went down on 10.
Q. Did you see the accident?
A. Yes, sir.
Q. Tell the jury just what you saw take place there at the accident.
A. Well, we had a hold of I don't know how many cars, I hear the evidence here of eight cars, I should judge there was not more than that, and he give a signal to stop, and I was to take number six switch for that there as soon as the cars parted. I saw him step in, and then he rolled out in front of the wheel with a part of his leg gone, and clear of the track, and the next I noticed was where the blood was, was about 4 or 5 feet from the track.
Q. What was it you noticed four or five feet from the track?
A. Where he rolled to, where the blood was, where he lay. I was somewhat excited and I hustled around there to see if I couldn't get a grain door or something to get him on, and get him up to the doctor. I went back towards the main line, by that time I got the switches lined, somebody picked him up and put him on in front of the engine, and the engine backed up onto the main line and I threw the switch and got on with him, me and Mr. Brogren, the helper. I threw my old coat over his leg, and we held him on there until we got to the passenger depot, got a stretcher and then we took him to the hospital. We were probably there at the passenger depot 10 minutes, might have been more, waiting until we got a stretcher to get him out.

Q. What direction was the train moving as he stepped in between the cars?

196 A. It was moving west or north.

Q. Did he or did he not fall in the direction that the train was moving?

A. He rolled right out in front of it, his left leg came right out. I thought it was very close to me, it was naked from I should judge from there down (indicating). Of course it was done very quick, and it got me pretty well excited there for a few minutes, but I know it was I should judge up near the knee there somewheres.

Cross-examination.

By Mr. DAVIS:

Q. Mr. Conway, you were looking at Mr. Otos as he stepped in between the cars?

A. Yes, I just stooped over to get the switch before they were going to part, you know.

Q. Which way were you facing when you stooped over?

A. I was adjusting the switch.

Q. Which direction did you face?

A. The lead is a little bit northwest there, we call it west and north.

Q. You were facing in a westerly direction were you?

A. I was facing where I was standing at the switch.

Q. The same direction as the cars were going?

A. Yes, they were shoving in on six.

Q. And you were stooping down?

A. I was stooping down to get the switch, those ground-switches, you know.

Q. Those little short switches?

197 A. Yes, you have to get down to get hold of them.

Q. Did you have a hold of the switch at the time that you saw Harry Otos step in between the cars?

A. I was right there, I wouldn't say that I had hold of the switch.

Q. How far were you away from Harry Otos when he stepped in?

A. I should judge about thirty feet, I paced it off the next morning.

Q. About half a car-length?

A. It was more than half a car-length.

Q. How long are those cars?

A. Some of them are 33, some of them 40 and 44.

Q. Mr. Conway, you say it happened very quickly, he rolled out very quickly.

A. Yes, he did.

Q. Isn't it a fact that when he threw himself out he grabbed hold of the ground somewhere and tried to pull himself away from that track?

A. I can't say anything about that.

Q. Don't you know that it happened that way that day?

A. It was done very quick.
Q. Did you see him as he lay there trying to pull himself away from the rail?
A. No, I didn't.
Q. You didn't look at it?
A. He rolled right out.
Q. How far did he roll from the track when he rolled out?
A. He laid very still, about 4 or 5 feet.
198 Q. West from the other tracks?
A. The new lead is on the other side.
Q. How far was that other track, the new lead, from this track upon which he was injured?
A. I don't know, I couldn't say, it ain't very far.
Q. About 4 or 5 feet isn't it?
A. Oh, it is more than that.
Q. How many feet?
A. It must be more than 10 feet apart, those two leads.
Q. Then there is no track between that track upon which he was injured and the track to the north, is there?
A. Yes, there is a track, a new lead, I told you.
Q. Within 10 feet?
A. It might be more than 10 feet.
Q. There is no track nearer to that track, the track upon which he was injured?
A. No, that is all.

ELMER BROGREN was called as a witness on behalf of the defendant and duly sworn.

Direct examination.

By Mr. JOHNSON as follows:

Q. Where do you reside, Mr. Brogren?
A. Willmar, Minnesota.
Q. How long have you resided at Willmar?
A. Oh, 7-8 years.
Q. What position do you hold with the defendant company?
199 A. Brakeman.
Q. Is that what you call a switchman also?
A. Well, switching at certain times, switching at certain times.
Q. How long have you held that employment with the Great Northern?
A. About three years.
Q. And were you so employed at the time of the accident?
A. Yes, sir.
Q. Under which foreman?
A. Mr. Otos.
Q. The plaintiff?
A. Yes, sir.
Q. Where were you at the time of the accident?

A. On the north side of the lead, about number eight switch, at about number eight switch.

Q. How far from the place of the accident?

A. Well, about three car-lengths I should judge, about 115 feet, something like that.

Q. Was your attention attracted to the accident?

A. Not until I heard him holler.

Q. It was attracted by the hollering?

A. Yes, sir.

Q. What were you doing at the time you heard him holler?

A. Opening the knuckles on the cut that was made ahead of this one.

Q. And did you look towards him when you heard him holler?

A. Yes, sir.

Q. What was being done with these cars that he was working on then?

200 A. Being switched out to different tracks.

Q. Do you know whether or not there was a car there in that train at that time that was in a defective condition?

A. Yes, sir.

Q. And where was that car?

A. It was on the lead, the one we was switching with.

Q. And who informed you of its condition?

A. Mr. Otos.

Q. Did he give you any instructions as to what was to be done with these cars at this time, or with this particular car?

Mr. DAVIS: Yes or no to that.

A. Yes.

Q. What was his instructions?

A. Different track numbers that we were to hold the cars upon.

Q. What were they?

A. 10 was used that day.

Q. What was the last instruction he gave you with reference to these cars before the accident?

A. Nothing, just the line-up of the different cuts that was being made.

Q. And what was that, do you remember where the first car was going, what track?

A. 8, 6 and 10, I believe.

Q. What track was 10?

A. Used for bad-order track.

Q. What was your duty or what was it for you to do with reference to these cars on the track?

A. Getting all the outside switches that was away from the—getting all the switches that were off at a distance, away from

201 the engine and where the foreman worked.

Q. What were you to do with reference to the car going on track 10?

A. Lineup for its destination, lineup with this certain track.

Q. Explain to us what you mean by lining up a switch, doing that is what?

A. Well, so that none of the cars will run down any of the other switches, down any of the other tracks, numbering from 6 to 10.

Q. You mean to place it so that it will get the car when it is pushed over there?

A. Yes, sir.

Q. Did you notice about this time, either before or after the accident, whether there was any repair-track card on this car that was going to track number 10?

Mr. DAVIS: Objected to as immaterial and too indefinite.

COURT: Objection overruled.

(Question read.)

A. Yes, sir.

Q. And that was a card like Exhibit 2 (shown witness).

A. Yes, sir.

Q. When did you notice that, tell the jury as close as you can?

A. I don't just remember whether it was down in the yard at the time we was making the cut of these cars, or whether it was on the lead.

Q. About how long after he was hurt, if it was after?

202 A. I don't believe it was after.

Q. You don't remember exactly?

A. No, sir.

Q. Was it the same day?

A. Yes, sir.

Q. On what side of the car was it that you noticed it?

A. On the north side.

Q. You were working on the north side?

A. Yes, sir.

Q. As I understand it, you were working under Otos and subject to his directions at this time?

A. Yes, sir.

Q. You testified you heard Mr. Otos holler, now what did you see take place after you heard him holler?

A. He was falling out from in under the cars.

Q. Is that the first thing you saw?

A. Yes, sir.

Q. Just tell the jury exactly what you saw, just how he fell, as near as you can?

A. Well, I had my back towards him at the time, and I heard him holler once or twice, and as I looked back why he was falling from between the cars.

Q. Which way were the cars moving at this time when he was falling?

A. West.

Cross-examination.

Q. Mr. Grogren, you say that there were about three cars there that were to go down on different tracks?

203 A. Yes, sir.

Q. Two of them were further west than this car that ran over Harry Otos, were they, more towards the west?

A. Well, the one I was working on.

Q. Was further towards the west than that?

A. Yes.

Q. And then there was another one between the one Harry Otos was hurt on, that was going on track 6, and your car going on track 8?

A. Yes.

Q. Harry's car, do you know where that was going on?

A. Toward 10, was our line-up.

Q. How do you remember that?

A. From the line-up we got from the foreman.

Q. Have you ever seen it since, or was it handed to you in writing?

A. Just spoke.

Q. What he told you?

A. Yes.

Q. Will you swear to this jury now that you recollect that this car that Harry Otos was injured on was going on track 10, yes or no?

A. Yes.

Q. You were a witness in Federal Court in April last were you not, for the Great Northern Railroad Company?

A. Yes, sir.

Q. I will ask you if you were asked this question: "Where were these cars being placed, do you know?" Do you remember it,—you were asked that question, weren't you?

A. Yes, sir.

204 Q. I will ask you if you did not answer: "I don't remember just what track they were going on, they were going down the lead," yes, or no, what is your answer, sir?

A. Going down toward number 10.

Q. Didn't you state in Federal Court as follows to that question: "I don't remember just what track they were going in on, they were going down the lead." Please answer my question by yes or no? Didn't you answer it that way?

A. Yes, sir.

Q. That is a fact, isn't it, it is a fact that you didn't know last April and don't know now?

Mr. JOHNSON: I object to counsel's charging at the witness in that manner, he can find out by sitting down.

Q. Mr. Brogren, you didn't testify at the last term of court that this car,—on the other trial of this case, that this car was going on track 10 did you, yes or no?

A. Going down the lead.

Q. I didn't ask you that, you didn't state that it was going down track 10 did you?

A. No, sir.

Q. You were asked where it was going and you answered you didn't know, didn't you?

Objected to as a repetition.
Objection overruled.

Q. Your answer sir, that is a fact, isn't it?
A. Yes, sir.

Mr. DAVIS: That is all. No, wait a minute.

Q. These cars upon which the engine was placed or hooked onto the switch-engine, the cars, how many were there?
A. I don't just remember how many there was.
205 Q. There was three at the time Harry got hurt were there, or more?
A. There was more.
Q. You don't know and didn't know at the time, last April, where any of these cars were going or on what track, did you, yes or no? And didn't you so state?

(Question read to witness.)

Q. I withdraw that. Didn't you so state? Just answer the question.
A. Well, I don't remember.
Q. You don't remember?
A. No, sir.
Q. When was the first time, Mr. Brogren, that you ever told any one that you remembered this car was to go on track 10?
A. Well, that I don't remember.
Q. Was it not to Mr. Janes, or Mr. Johnson or Mr. Lende, the attorneys for this company? Isn't that a fact, since you came here to Granite Falls?
A. I have spoken of that before.
Q. I say, isn't the first time that you ever told any one that you remembered this car was to go onto track 10 when you told Mr. Johnson or Mr. Janes or Mr. Lende, or Mr. Countryman, the general counsel who sits back there, right there, right here in Granite Falls?
A. No, sir.
Q. You did tell them that since you came here, did you not?
A. I told them, yes, sir.
Q. You talked it over with them?
A. Yes, sir.
206 Q. Did you read your testimony in Federal Court?
A. Yes, sir.
Q. They read it over with you?
A. No, I haven't read my testimony I made in Federal Court with those men.
Q. You read it over alone?
A. No, sir, I haven't read it over.
Q. You never have read it over?
A. Yes.
Q. You have?
A. Yes.
Q. Where?

A. Down in Minneapolis.
Q. After the trial?
A. Before the trial.
Q. I mean, did you ever read over the testimony that you gave in Federal Court, in this kind of a book (indicating)? Since you came here you talked with the attorneys, haven't you?
A. Yes, sir.
Q. They have had a book which showed the testimony that you gave in Federal Court, haven't they?
A. I don't know whether they have or not.
Q. Have you seen such a book at all?
A. Yes, sir.
Q. When?
A. Yesterday.
Q. Where?
A. In Otos' room.
Q. In Otos' room, you read it there, did you?
A. Yes, sir.
207 Q. Did you read your testimony then?
A. Yes.
Q. Did you remember this, sir, that you read that you didn't know where these cars went?
A. That I don't remember.
Q. Now, Mr. Brogren, I want to ask you this: Who was the first person whom you ever told that this car was going on track 10?
A. I don't know.
Q. How long after the accident was it you ever told any one about it?
A. I don't know just how long after the accident.
Q. When you testified in Federal Court "I don't remember just what track they were going in on, they were going down the lead," you had reference to these cars among which was the car upon which Harry Otos was hurt, didn't you?
A. I don't remember.
Q. When you testified in Federal Court to this question, "Where *weer* these cars being placed, do you know?" you had reference in your answer when you answered, "I don't remember just what track they were going in on, they were going down the lead," you had reference to the cars including the car that Harry was hurt on, didn't you?
A. Yes, sir.

Redirect examination.

By Mr. JOHNSON:

Q. Are you acquainted with Mr. Countryman, the general counsel that Mr. Davis speaks about?
A. No, sir.
208 Q. Have you ever seen him?
A. No, sir.
Q. Do you know who he is now, or have you seen him now?
A. No, sir.

Q. When was it you were in Mr. Otos' room?
A. Yesterday, to see Harry, I stepped in there yesterday to see Harry.
Q. How many times were you in there?
A. Just once.
Q. When did you first talk to any of us, either my partner, Mr. Lende, or Mr. Janes or myself about this case?
A. Today noon.
Q. How long were you with us?
A. About 10 minutes.
Q. Who was present?
A. Yourself, and that gentleman and this gentleman, and Mr. Conway and Mr. Olson (indicating).
Q. What gentl-man do you designate *to* as gentleman, you mean Mr. Janes?
A. I don't know the names.
Q. You mean Mr. Janes and Mr. Lende?
A. Yes, sir.
Q. While you were in Mr. Otos' room you found a transcript of the former trial and you read some of your testimony?
A. Yes, sir.
Q. And who was there besides Mr. Otos at this time?
A. Otos' wife and child.
Q. Anybody else?
A. Later on there was, Mr. Otos came in.
209 Q. His brother or his father?
A. And Mr. Davis.
Q. Mr. Davis there?
A. Yes, sir, just as I stepped out.

By Mr. DAVIS:

Q. I came in as you stepped out?
A. Yes, sir.
Mr. JOHNSON: Or, do you mean you stepped out as he came in?
Mr. DAVIS: That don't make any difference, you can have it any way you want it.

Mr. CONWAY was recalled by plaintiff for further cross-examination.

Examined by Mr. DAVIS:

Q. Mr. Conway, you were present at the April term of the Federal Court in Minneapolis, I believe, last spring?
A. Yes, sir.
Q. And were not called as a witness in the case?
A. No, sir.

Mr. JANES: I will ask to have it stricken out as immaterial.
COURT: Denied.

W. M. PARKINS, was called as a witness on behalf of the defendant and duly sworn.

Direct examination.

By Mr. JOHNSON as follows:

Q. Mr. Parkins, where do you reside?
210 A. At present my family is in White Fish, Montana.
Q. Where did you reside in September, 1912?
A. At Willmar.
Q. And in whose employ were you at that time?
A. The Great Northern.
Q. In what capacity?
A. Engineer.
Q. Do you recollect the occasion of the injury to Mr. Otos, the plaintiff?
A. Yes, sir.
Q. State whether or not you were the engineer running the engine in his charge at that time?
A. I was.
Q. Who has control of the train under those circumstances?
A. The foreman.
Q. Used for switching purposes?
A. The switch foreman.
Q. And that was Mr. Otos?
A. That was Mr. Otos at that time, yes, sir.
Q. From whom do you get your signals in operating that engine?
A. Well, sometimes from the foreman and sometimes from the helpers, it depends a good deal on what we are doing and where they are.
Q. If the switch foreman is present, then whom do you get them from?
A. They are supposed to come from him, yes.
Q. What were you doing with this train at the time of the injury?
A. Oh, switching it, the usual run of work, switching cars out on different tracks.
211 Q. Do you know what tracks they were putting the end cars onto?
A. Oh, I could make a guess at it.
Mr. LENDE: Answer yes or no, don't shake your head.
A. No, I don't,—excuse me, I didn't understand that.
Q. Which way was the train moving at the time of the accident?
A. West.
Q. About how fast was it moving?
A. Oh, anyway probably 3 to 5 miles an hour; it is pretty hard to guess at speed in a case of that kind.
Q. Did you see Mr. Otos at the time of the injury?
A. I saw him when he went in between the cars, but as quick as he got past the corner of the car he went out of my sight, I couldn't

see him. I didn't see him again until he came out from under the cars, after he was injured.

Q. What did you notice about him when he came out from under the car, just tell the jury?

A. Why, when he came out it just seemed as though he kind of threw himself this way (indicating),—he was making an effort to get away from it, anyway.

Q. Now, here, I just want to get this so that we can get some record of it: That direction is west (indicating); now you come and get into the position here that Mr. Otos was in at that time?

A. When he came out?

Q. Yes.

212 A. Well, of course he was pretty low down, he seemed to be coming out just like this (indicating).

Q. Which way was the train moving?

A. Moving this way.

Q. West?

A. West.

Q. How did he fall with reference to falling with the train or the other way?

A. Why, when I saw him fall, he seemed to almost go—he was going a little with the train and going out.

Q. Going with it and out?

A. Going with it and out, that is the way it looked to me. Of course, it was done so quick that I couldn't hardly tell.

Cross-examination.

By Mr. DAVIS:

Q. This train was moving at about from 2 to 3 miles an hour, as I believe you testified at the last trial did you not?

A. No, I think I said from 3 to 5,—anywhere from 3 to 5 if I recollect right.

Q. I will just hand you this to refresh your memory, Mr. Parkins? (Paper handed witness.)

A. Well, possibly I may have said it (reading).

Q. Three to four?

A. It is somewhere along there.

Mr. DAVIS: It is conceded that that was his testimony at the last trial?

Mr. JANES: Oh, certainly.

Q. Mr. Parkins, as I understand you, when you saw him fall he seemed to throw himself away from the train?

213 A. Yes.

Q. I will ask you if he didn't fall upon his back, isn't that a fact, Mr. Parkins?

A. Well, I couldn't say.

Q. What is your best judgement on that?

A. I couldn't say whether he did or didn't.

Q. You don't know?

A. It was done so quick that I wouldn't swear to it, to just how he fell.

PETER OLSON, was called as a witness on behalf of the defendant and duly sworn.

Direct examination.

By Mr. JOHNSON as follows:

Q. Where do you reside, Mr. Olson?
A. Willmar.
Q. How long have you lived at Willmar?
A. I have been there 13 years now.
Q. What position do you hold with the defendant railway company?
A. I have been section foreman.
Q. How long?
A. Well, foreman for one year at this time.
Q. And were you employed there in the yards at Willmar at the time of the accident?
A. Yes, sir.
Q. What were you doing?
A. I was foreman.
Q. Do you know where this accident occurred?
A. Yes, sir.
Q. Well, where was it?
214 A. It is on the guard-rail between number five switch.
Q. You mean number five switch or number five guard-rail?
A. Well, number five guard-rail, of course, that is number five switch.
Q. That is the same thing is it?
A. Yes.
Q. Are you familiar with the condition of that guard-rail and the blocking and the main-rail parallel with it, immediately before this accident?
A. Yes, sir.
Q. What condition was it in?
A. Good.
Q. Well, what was the condition with reference to the rail?
A. Well, the guard-rail—the outside rail was put in in April, a eighty-pound rail.
Q. You put in a new rail?
A. In the month of April.
Q. What year?
A. In 1912.
Q. The next preceding April?
A. Yes.
Q. What about the blocking?
A. Well, the guard-rail and blocking were shipped from St. Cloud shop.
Q. What kind of blocking was it?

A. It was cast-iron block at the end of the guard-rail, and two blocks in the middle.

Q. What condition was it in at this time immediately preceding the accident?

A. That was good, just the same as when it was put in.

215 Q. Do you know when it was put in?

A. Yes, in the month of April.

Q. 1912?

A. Yes.

Q. Is Defendant's Exhibit 1 that is here (indicating it) a substantially correct reproduction of the guard-rail and the main rail running parallel with it, and the blocking as it existed there at the point of the accident on that date?

A. It is the same rail, yes, the same thing.

Mr. JOHNSON: We offer Exhibit 1 in evidence.

Mr. DAVIS: No objection.

Q. Did you know of the accident?

A. I didn't see it.

Q. Well, I say, you knew of it?

A. Yes, sure.

Q. How did you learn of it?

A. We was going home, it was right by our car-house, we was going home for the night, it was right up to our car-house, right up to our tool-house.

Q. That is where you were?

A. Well, we was ready to go home.

Q. And then what happened?

A. Well, we all went over there, a couple of Greeks was there before I came there, and they hollered to me.

Q. You went over where?

A. To the place.

Q. Where the accident occurred?

A. Yes.

Q. Why did you go over there?

A. Well——

216 Mr. DAVIS: Objected to as calling for the conclusion of the witness and immaterial.

COURT: Objection sustained.

Q. When you got there who was there?

A. It was one Hungarian and three Greeks.

Q. Employees of the yard there?

A. Well, they had a car right there, a boarding-car.

Q. What did you see there?

A. I see his leg was sitting in the guard-rail.

Q. What is that?

A. I see his leg was sitting in the guard-rail, and they told me Harry Otos cut his leg off.

Q. Where was the part of the leg above the shoe, just indicate

where it was when you first came there and saw it,—this is the west end (indicating)?

A. He had his leg in the east end.

Mr. DAVIS: Go down to the east end and show him.

Mr. JOHNSON: I am doing this.

Mr. DAVIS: He said he had his leg in the east end.

Mr. JOHNSON: Just let me examine this witness, if you will.

Mr. DAVIS: All right.

A. Is this the east and that is the west?

Q. Yes.

A. And that is the way the lead runs (indicating).

Q. Yes. Now then, where was the leg, just take your seat a minute. Where was the leg above the shoe in reference to the rail?

217 A. The shoe was in there.

Q. I say where was the leg above the shoe, with reference to the rail, on which side?

A. It was laying on top of the guard-rail.

Q. All of it, the leg, on top of the guard-rail?

A. Yes, sir.

Q. And where was the foot?

A. A part of the foot, just a little part of it, was squeezed in at the block.

Q. Between?

A. Right on the block.

Q. What part of the foot, if any, was not squeezed in between the rails?

A. All of it except that part here of his foot (indicating), that was laying on the guard-rail.

Q. Did you see the shoe?

A. Yes.

Q. Did you see this here (indicating shoe)?

A. Yes, sir.

Q. Where was that lying with reference to the guard-rail?

A. It was laying in between the guard-rail and the frog.

Q. All right, put this shoe in the position that it was in when you first saw it, with reference to the guard-rail. (Witness does so.)

A. It was in between the frog and the guard-rail like this.

Q. How far from the rail?

A. Oh, about that far.

Q. How far is that?

A. About twenty inches.

Q. Explain just what position the leg was on the rail.

218 (Witness indicates on Exhibit 1.)

A. The foot was squeezed right in here (indicating).

Q. Between the rails?

A. Between those two rails, sitting there solid and the leg was laying along side here.

Q. On the other rail or on the guard-rail?

A. On this rail outside here, this is the guard-rail and here is the main rail (indicating). Here is a piece of the skin, you know, pulled off, and squeezed in here, and of course it was cut off, and here was the foot in (indicating).

Q. You mean to say that leg was right on top?

A. Yes, it was laying along in here, the top of the foot was squeezed in here (indicating).

Q. When you got there you say these Greeks that you refer to were there? When you arrived there was that the condition, you say there were three Greeks?

A. There was three Greek and one Hungarian.

Q. What were they doing if anything?

A. They were standing there, looking.

Q. When you got there what did you do first?

A. I told them to go and get some bars and a monkey-wrench.

Q. After you had told them that what did you do?

A. Then I went over and I was going to the general office and tell them about the leg, and then the whistle blew six o'clock and Mr. Adams came out of the round-house, the round-house foreman.

Q. He came out?

A. He came out.

219 Q. And then what did you do?

A. I asked him what we were going to do about this foot.

Q. What did you do?

A. He said, go and get you a man and get him out.

Q. What did you do?

A. I went over there.

Q. Over where?

A. Over to the accident, over to the place.

Q. What did you do when you got there?

A. Well, I picked up his stockings and his shoes and a nickel plate and carried out to the tie-pile, and the switch-list was laying there, and I told one of the Greeks to take care of the switch-list, and those Greeks tried to break the leg out, and Mr. Sletten stood there and he said, "Don't break it," and they unscrewed the rail and took it out. They started to work at it but they couldn't get it out, it was bare meat and blood.

Q. What did you do then?

A. We unscrewed the bolt and pried with a bar and got it out.

Q. Then what did you do?

A. Well, we got some paper and I wrapped it up in a piece of paper, and I started to go down to the car-house, and I met Mr. Conway.

Q. Do you know Newberg that came out with Mr. Adams from the roundhouse, that is the young man that was testifying here yesterday?

A. Yes.

Q. Were you there when he arrived at the place?

A. He was there with Mr. Adams, yes, at the time we worked there.

220 Q. I say, were you there when he came to the place?
A. I was there before he came there.
Q. Were you there when he got there?
A. Yes, I was there then, they walked ahead of me, Mr. Adams and Newberg.

Cross-examination.

By Mr. DAVIS:

Q. Do you know whether this boy Newberg had been there and gone away and come back again?
A. No.
Q. You don't know that?
A. No.
Q. But when you got there the shoe was out there between the rails, lying upon the north side of the track?
A. It was laying just like this (indicating).
Q. But I mean north side instead of south side?
A. No, the other part was laid on the north side.
Q. This laid on the south side?
A. Yes, between the frog and the guard-rail. Between the guard-rail and the frog.
Q. Guard-rail and the inside of the frog?
A. Yes.
Q. And the other part of the shoe was on the north side?
A. Yes.
Q. Away from the main rail?
A. Well, it was laying there, some fellow had thrown it around there.
Q. You are quite sure that this shoe was in between the guard-rail and the opposite main rail, towards the south?
221 A. Between, in the center of the track.
Q. Between the two main rails?
A. No, between the frog and the main rail.
Q. I know, but it would be to the south of the main rail that was attached to the guard-rail upon which his foot was?
A. Well, it would be between the guard-rail and between the frog.
Q. How much of his foot was crushed in between this guard-rail and the main rail?
A. Oh, about half of it. Half of the foot.
Q. How much of his leg was crushed in between the guard-rail and the main rail?
A. It was laying along side there, the main rail.
Q. Was it on the main rail, on top of it?
A. On top of it, yes.
Q. Wasn't it all crushed and mashed?
A. No, it wasn't broken at all.
Q. It wasn't broken at all and was laying there?
A. It was laying there, it wasn't any break at all.
Q. There wasn't a bruise on it?

A. No, sir.
Q. It was laying on top of the main rail, you are quite sure of that?
A. Yes, sir.

Redirect examination.

By Mr. JOHNSON:

Q. Do you mean to say, Mr. Olson, that this leg was lying on top of the rail that the wheels went over?
A. No, the wheel didn't go over his leg, they squeezed the foot down sidewise, and cut it off.
222 Q. And then it wasn't on top of the rail where the wheel went?
A. Well, it couldn't get in no other place, because the foot was kind of squeezed in so the leg was straight.
Q. Along side of it?
A. Well, in between the center here and the main rail, and the guard rail there, just along side.
Q. On top between the two of them?
A. On the top between the two of them, yes.
Q. What do you mean by saying that this leg was not bruised?
A. Well, down here it was all skin and blood.
Q. When you say that you refer to the part between the foot and where it was torn?

Mr. DAVIS: Objected to as leading.
COURT: Let him explain.

Q. Explain what you mean by saying that it wasn't bruised?
A. Well, you know, I was excited myself because I had a bad job there to try to pull it out, because the foot was all squeezed in.
Q. But I am asking you as to what you mean by saying that the leg was not bruised?
A. Well, it wasn't broke.
Q. Where?
A. Here (indicating).

Recross-examination.

By Mr. DAVIS:

Q. It wasn't bruised up here, it wasn't bruised up there above, there was no bruise up here by the lower part of the leg was there?
223 A. Well, I don't know anything about that, I couldn't say that.
Q. What?
A. I didn't look it so well over so I could say anything about that.
Q. Didn't you just state to the jury that the part of the leg that was laying there wasn't bruised at all?
A. Well, all of that was broken up (indicating).
Q. Mashed?
A. Yes.

Q. How far was his leg off from the foot towards the crotch, above the knee?

A. Well, I should judge about so (indicating).

Q. Was the knee-cap laying down between the guard-rail and the main rail?

A. No, the knee-cap was laying with the other part, there was a piece of meat about that long (indicating).

Q. Mr. Olson, I will ask you this: Was there any bone—was the entire leg above the knee there laying there?

A. (Indicating.) The whole thing was laying there.

Recess.

Examined by Mr. JOHNSON:

Q. Did you testify that right after the accident you picked up the switch-list at the place where it occurred, and handed it to a Greek?

A. Yes.

Q. I show you defendant's Exhibit 3 and ask you whether or not that is the switch-list?

A. Yes.

224 Q. Do you know whether there were blood-spots on it at the time you picked it up?

A. There was blood-spots on it, yes.

Mr. JOHNSON: We now re-offer Exhibit 3.

By Mr. DAVIS:

Q. Where was this switch-list when you picked it up?

A. It was in between the main rail and the other lead track.

Q. Did you notice the conductor's name that was signed to it?

A. No, I did not.

Q. Did you notice how much blood was on it?

A. Oh, they was throwing it around there an Sletten told me to pick it up.

Q. Was it laying around in the blood when you picked it up?

A. No, it was laying there on the ground, that was not in the blood.

Q. How much blood was on it when you picked it up?

A. Oh, I didn't look so very much at it, because I gave it to one of the Greeks and told him to bring it down to the office.

Q. So the fact of the matter is that you didn't look at it very much but picked it up and gave it to a Greek?

A. Yes, I just picked it up.

Q. Did you notice the number of any car when you picked it up?

A. No, sir.

Q. Did you notice any writing on the switch-list when you picked it up?

225 A. No, I know it was a switch-list.

Q. That is all you knew?

A. That is all I knew.

Q. You couldn't swear but what this was some other switch-list could you now, Mr. Olson? You don't know that that is the same

one as you picked up or another one that was made afterwards, do you?

A. Well, this is the same where the dirt and blood is on it.

Q. Do you mean that that is the only reason you know that that is the same one, is because this one is dirty?

A. Yes, sir.

Q. You never looked at any particular figure?

A. No.

Q. You didn't look at the conductor's name?

A. No, sir.

Q. You didn't examine the switch-list in fact to tell—in order to tell its exact condition, did you?

A. No, I know it was a switch-list and I told him to take care of it.

Q. All you know now is that this is a switch-list?

A. That is all.

Q. You don't mean to tell this jury that you know by looking at this switch-list that there is anything on this switch-list by which you can swear it is the same one you picked up, do you?

A. Well, possibly the spots tell.

Q. Where were the spots on it, did you notice, at the time you got the switch-list whether they were on the front or back?

A. There was some on the front and some on the back.

226 Q. Where were they with reference to being on the bottom of the switch-list or the top, at the time you picked it up?

A. That I didn't look so very close on it, because when I saw the switch-list I told the Greeks to take it down to the general office and leave it there.

Q. You don't know whether the blood spots were at the top of the list or at the bottom?

A. Oh, I didn't look at very closely.

Q. Well, do you know?

A. Well, I know it is some on the bottom and some on the back side.

Q. Are there any on top?

A. Well, I wouldn't swear to that.

Q. Well, do you know now?

A. I know that there is a switch-list.

Q. Do you know now whether there is any blood on the top of it. where the printing is?

A. I know it is a switch-list.

Q. Do you know now whether there is any blood on the bottom of it, where the writing is?

A. I don't know.

Q. Will you swear now there is some blood at the bottom of it?

A. Well, some in the middle of it, or a little further down, where it is pinned together.

Q. Mr. Olson, do you know the number of the car that that blood is opposite?

A. I didn't know, I didn't look at the car at all.

Q. Don't you know that that spot of blood happens to be opposite the car 125896?

A. Well, I suppose the blood didn't come out of the car, that come out from his leg.

227 Q. I say do you know,—you may look at it now,—whether this blood that is on this card is opposite car numbered 125896, look at it? Read the figures there and find that car 125896.

A. Well, I guess I will have to put my glasses on.

Mr. JOHNSON: Objected to as being a self-evidence fact, if it is on there.

Mr. DAVIS: Only testing his recollection is all, and that will be followed up by other questions.

No ruling.

A. Well, I got it, I find it.

Q. Well now, car number 125896, that appears on that?

A. It is down there (indicating).

Q. Now, did you look at that switch-list and notice that spot of blood opposite the number of the car when you picked it up?

A. I did not. Of course I know it was a switch-list.

Q. And the only way you have of telling this jury that it is the same switch-list is because this one is dirty, and because there is some spots of blood on it?

A. Yes, sir.

Q. Isn't it?

A. Yes, sir.

Q. If this were a switch-list made up afterwards that was dirty and spots of blood on it, you couldn't tell whether it was the same or a different switch-list, could you?

A. Yes, I could.

Q. Tell the jury how?

A. Because I could see I picked it up and looked at it,

228 and I see it was a switch-list, and I told one of my men to bring it down to the general office and leave it there until somebody called for it.

Q. What is there about that switch-list that would be any different from a switch-list that was made up afterwards, that was dirty and had blood on it,—tell the jury?

A. Yes, because it would have been clean looking and a little different, it is so dirty.

Q. But you could have the dirt put on afterwards and some spots of blood put on there, and wouldn't it look like that one?

A. No.

Mr. JANES: That is going pretty far.

Q. When you picked up the switch-list was it pinned together like this?

A. It was pinned together, yes.

Q. Just like this?

A. Yes, sir, they always do that.

Q. And do you know whether that is the same pin?

A. No, I don't know.

Mr. DAVIS: No objection to Exhibit 3.

R. J. HILL, was called as a witness on behalf of the defendant and duly sworn.

Direct examination.

By Mr. JOHNSON as follows:

Q. Where do you reside, doctor?
A. Minneapolis.
229 Q. How long have you resided there?
A. 53 years.
Q. What is your business?
A. Physician and surgeon.
Q. Are you a regularly admitted, licensed and practising physician and surgeon?
A. I am.
Q. How long have you been?

Mr. DAVIS: Qualifications admitted.

A. 39 years.
Q. You are acquainted with Mr. Otos the plaintiff?
A. I met him last year.
Q. You examined him in Minneapolis, last April?
A. I did.
Q. You examined him again yesterday?
A. I did.
Q. You heard the testimony of Dr. Scheldrup, Jacobs and Kerns here?
A. I have.
Q. You heard the testimony of the plaintiff and all the evidence in this case?
A. I have.
Q. Now, when you examined him yesterday, did you examine the stump of his leg?
A. I did.
Q. By the way, where is that leg amputated?
A. Two inches and a half below the joint.
Q. Now, then, tell the jury just what condition you found that stump in when you examined him yesterday.
A. The stump is entirely healed, and covered about half of its surface with a true skin. The other half is covered by skin
230 grafts and scar tissue. There is no apparent inflammation in the stump at the present time, the general condition is good, except that there are two exquisitely tender points in the stump.
Q. Are those the places that have been referred to, nerve tumors?
A. Nerve tumors, yes, sir, neuroma.
Q. Explain to the jury just what nerve tumors are.
A. After a nerve is cut off or injured and in the process of repair, it is apt to throw out,—nature throws out, a redundant amount

of material, and particularly on the end of a nerve it often results in a bulb or bunch on the end, the tumor, composed of nerve fibers, that is usually exquisitely tender.

Q. Was that the condition that you found on the stump of Otos' leg?

A. It was.

Q. How many of those bunches did you say there was?

A. Two.

Q. What is the condition of those nerve ends or bunches as to being tender or painful?

A. Very painful.

Q. Just describe them a little more fully to the jury.

A. Well, they are exquisitely—I don't know hardly what word to explain,—on pressure or on motion these little bulbs are caught in the scar tissue, and they are very painful on any pressure whatever, and often on motion, the slightest movement of the
231 stump, being caught fast in the scar tissue will pull on them and cause very severe pain, so much so that it throws the stump into spasm,—the muscles will involuntarily contract and undoubtedly cause a great deal of pain.

Q. State to the jury what in your opinion is the effect of those bunches, that condition of those nerve ends, upon his general condition.

A. Certainly very depressing in every respect. A man that is suffering with these intense spasms of pain will necessarily be sleepless, with more or less loss of appetite, extremely nervous, and subject to all sorts of nervous phenomena on account of the constant irritation of this diseased condition of the nerve termini.

Q. Is there a practical way of remedying that condition?

A. Yes, sir.

Q. Describe to the jury what way that is.

A. Cut down on the stump and resect these diseased nerve endings, pulling them out and cutting off higher up, and then by stitching the end of the cut nerve together, pulling it over, to prevent a recurrence of a similar condition, and sewing the end up so as to leave no raw surface exposed.

Q. What kind of an operation is this, is it a common operation?

A. Yes, sir, very common.

Q. A dangerous operation?

A. No, sir.

Q. Is that operation frequently done in cases of this kind?

A. That is the most troublesome complication we have.
232 Q. I say——

A. Yes, sir, very frequently.

Q. Could this operation be performed without a general anesthetic?

A. Yes, sir.

Q. Explain to the jury how.

A. By injecting with a local anesthetic,—cocaine, novaine, or any one of the local anesthetics, injecting the area to be cut, to be operated, and going above that, injecting into the nerve trunk itself,

you block off the sensation to the brain. It is then a painless operation, to cut down and cut off the nerve and finish it up.

Q. Did you examine Mr. Otos' back yesterday?

A. I did.

Q. What condition did you find his back in, state to the jury just how you examined it and what the result of your examination was?

A. Otos was stripped and in his bed, an effort was made to determine whether there were any tender spots in the back. I noticed on touching him anywhere that he was tender, even the shoulder and back of the neck, any place that he seemed to be touched, he was on his attention and evidently wondering whether or not he would be hurt. I called his attention to the fact that he couldn't have pain all over. I wanted to locate definitely the tender spots, and I would not hurt him, I didn't intend to make any severe pressure, but I wanted to find out if there were any particular spots along the back that seemed more tender than others. After that I was unable to make a very satisfactory examination. Down to the small of
233 the back and in the small of the back he complained of intense pain, apparently I did not hurt him much until I reached the small of the back, and that he complained of bitterly as causing him pain. The muscles of the back seemed to be in normal condition. There is no curvature of the spine, no displacement of the spinal vertebræ, nor any particular muscular disturbance.

Q. Was there any evidence of any kind of injury to the spine?

A. None whatever.

Q. From your examination and from the testimony as to the pain in the back and its conditions, have you an opinion as to what is the cause of the sensitiveness and that soreness in the back?

A. I have.

Q. State what it is and why?

A. In my opinion this pain in the small of the back is due to the irritation in these nerve trunks that are now enlarged, the bulbous trunks. The moment a nerve, or, soon after a nerve becomes injured, the natural tendency is to convey that pain as well as the inflammation along the nerve trunks to its point of origin, where the nerve is given off from the spinal cord.

Q. About what part of the back?

A. In the small of the back, in this particular case. I was going to say, these particular nerves that are involved in this condition have their origin from the spinal cord in the small of the back, and in my judgment that is the cause of the pain in the back, the irritation conveyed up by these nerves,—these bulbous inflammations on the nerve termini.

Q. Now then, assuming that you performed the operation that you testified in regard to on those nerve ends where those
234 bunches are, what would be the effect of that operation upon the condition of his back?

A. I think it would entirely relieve it.

Q. Why?

A. Because the source of the irritation is removed, the cause that produced it. My belief is that it is conveyed up from these inflamed nerve endings to the small of the back, and that the removal of the cause would remove the condition.

Q. The irritation will cease?

Mr. DAVIS: Don't lead the witness, he is at least intelligent.

Q. What effect, if you know, or what, if any other cause do you say there is for the sensitiveness of his back, besides the condition of this nerve?

A. Well, the long continued pressure on the back, he has lain on his back for a considerable length of time, in a prone condition, and the back itself shows evidence of pressure, particularly in the small of the back, continued pressure on the skin.

Q. Assuming that the operation was performed, and it relieved the congestion of that nerve, is there any reason why the sensitiveness due to lying on the back should not also be relieved and go away?

A. None whatever, as long as he gets off from it.

Q. Is there any reason why Mr. Otos should not be able to walk on crutches?

A. None, except the pain in the back.

Q. If the pain in the back was removed then would there be any?

A. None whatever.

235 Q. What part of the spinal cord do these nerves come from?

A. They are given off from the lower portion of the spinal cord, the lumbar and sacral regions.

Q. These two nerves are what nerves?

A. The anterior crural is the nerve that is involved in the upper enlargement, it is contracted in the course of the scar just as it crosses the spermatic cord, that is the anterior crural. The other is doubtless the great sciatic.

Q. One of these bunches that you speak of is at the end of the anterior crural nerve?

A. The anterior.

Q. And the other at the end of the great sciatic nerve?

A. Yes, sir.

Q. Now then, where does the anterior crural nerve come from the spine?

A. Do you want it anatomically? The third and fourth lumbar vertebræ.

Q. Where does the great sciatic nerve come from?

A. It comes from the fourth and fifth.

Q. And where do they leave the spinal column?

A. They leave the spinal column through these openings, forameni, between the bones.

Q. Where is that with reference to where they leave the cord?

A. They don't go directly out, they extend downwards; it is in the region of where they are given off from the cord.

Q. Where with reference to the sacrum?

A. They are in the region of the sacrum, they come down through the sacrum.

236 Q. Did you examine the condition of his right leg?

A. I did.

Q. What condition did you find, if any?

A. I found nothing abnormal in the right leg, it seemed to be in normal condition.

Q. What did that indicate to you?

A. That there is no degeneration of the cord, no injury to the spinal cord itself.

Q. Well, why?

A. Because then the right leg would be involved as well, degeneration of the cord would produce paralysis and various disturbances in that leg.

Q. Do I understand you to testify that if there had been any injury to the spinal cord it would also probably have affected the right leg?

A. Yes, sir.

Q. Now, then, doctor, you have seen this case on these two occasions, and examined him, and you heard the testimony, I suppose, as to his having had no sexual desire or ability since the time of the accident?

A. I did.

Q. Now, then, assuming that to be a fact, that he has had no sexual desire or ability since the accident, how do you explain that condition?

A. I think there is a very easy explanation, I think that the condition of that stump, with almost the weight of the bed-clothes, the slightest touch on it, producing a spasm and severe pain, the slightest motion producing pain, no man would have an erection with this condition of things, have no desire whatever; with the

237 slightest erection started, it would immediately start up this leg, and there would be nothing doing—absolutely impossible.

Q. Have you any opinion as to whether or not his condition of impotency as testified to, if it does exist, is permanent?

A. I have.

Q. And what is that opinion?

A. It is not permanent.

Q. Why?

A. There is no evidence of it. Of course we examined in this examination the penis and testicles, and found they were not atrophied; the testicles feel normal, the penis of normal size. He urinated in our presence yesterday, we wanted to get a sample of the urine. I gave him the bottle and he started the stream lying on his back without any difficulty whatever, and stopped a minute and asked if that was enough, and we said, go on, and he immediately started the stream and did that three times until he two-thirds filled the bottle, without any effort, without any difficulty in stopping and starting the stream, showing,—I haven't explained before that: The pudic nerve supplies the erector penis, that is

the nerve that enables a man to get an erection is the stimulation of the pudic nerve. The same nerve also supplies the ejaculatory muscles of the urethra, enabling a man to pass his water, to throw a stream with force.

It also supplies the rectum and perineum,—all these from the same nerve, that would be involved provided he had any involvement or inability from injury to this nerve of obtaining an erection.

238 In introducing my finger into the rectum, he grabbed it with absolute firmness, in fact, it was a difficult matter to make a rectal examination without causing a good deal of pain, showing that there was no relaxed condition of the bowel. The functions of the nerve in every other direction were perfect, and it is hardly conceivable that it would simply fail in this.

Q. Then, doctor, what is your opinion as to the effect of the operation upon the stump of his leg, such as you have described, upon his condition as to his sexual ability?

A. I think it would be relieved.

Q. How would it be relieved?

A. By allaying all this nervous spasm, that is the condition that I just described a few moments ago, this intense pain that he suffers on the slightest motion or on any pressure whatever, or any disturbance, and the general nervous condition that accompanies that. He is in a highly nervous condition generally and physically, all over. My opinion is that all of those symptoms would be relieved by removing the cause for their production.

Q. You heard him testify as to being nervous and waking up with a shock and being sleepless under those conditions?

A. Yes, sir.

Q. Assuming those conditions to exist, in your opinion what would cause those conditions?

A. It was the same cause, the irritation of these nerve termini that are caught in the scar tissue, in the old scar, the bulbous ends of these nerves.

Q. What is your opinion as to what the effect of an operation on those bunches on the stump of the leg would have on those conditions?

239 A. It would be relieved.

Cross-examination.

By Mr. DAVIS:

Q. How long have you been a physician and surgeon for the Great Northern Railroad Company?

A. 26 years.

Q. You have appeared in pretty near all of their personal injury cases in an advisory capacity, have you not?

A. A good many of them, I can't say all.

Q. That is, practically all those that are brought in Minneapolis?

A. During that time, yes, sir.

Q. And also others out in the county?

A. Yes, sir.

Q. Doctor, let me understand you, this stump you state is half true skin now, and half grafted skin?
A. Approximately.
Q. True skin is not the same as scar tissue?
A. No.
Q. What *or* portion of this stump is composed of scar tissue?
A. I say, I can't estimate the difference between the grafted skin,—or didn't attempt to,—between the grafts and the scar tissue; the scar tissue is in between the grafts, the grafts are put on and not covering it all.
Q. Doctor, do you mean to tell this jury that on this stump that there is no scar tissue except in between the grafts on the stump?
240 A. Oh, there is scar wherever you have a healing of skin.
Q. What proportion of this stump is scar tissue?
A. I don't know, sir.
Q. Did you not examine it to see?
A. I looked at it, yes, sir.
Q. You can't give us any idea?
A. Oh, I would say a third probably would be scar tissue.
Q. Half is true skin?
A. Yes, sir.
Q. And half is grafted skin?
A. Yes, sir.
Q. The one half that is grafted skin is over the one-third that is scar tissue, do I understand you?
A. No, the scar tissue is mixed in. Of course, wherever skin is united to muscle, it leaves a scar and there is necessarily scar tissue. Well then, these various grafts that were put on in the process of uniting there is some scar tissue left in between those grafts; the grafts didn't all unite.
Q. Scar tissue is pretty well imbedded into that stump, very deeply imbedded isn't it?
A. Yes, sir.
Q. And that, of course, involves all the nerve endings in the stump?
A. Surely.
Q. And causes, you say, exquisite pain?
A. Yes.
Q. And that pain in your opinion, doctor, has been causing a very exquisite and very serious hard pain as long as that injury has existed?
241 A. I expect it has.
Q. That is your judgment is it not?
A. Yes, sir.
Q. Doctor, will you tell the jury about how many nerves have their endings in that stump?
A. No, sir, I will not.
Q. Can you give us an estimate?
A. There are a good many.
Q. How many?
A. I wouldn't undertake to say.

Q. A thousand of them?
A. A great many.
Q. Isn't it a fact, Doctor Hill, that in order to get rid of those nerve endings being imbedded,—can you tell us in your judgment how many of the nerve endings are imbedded in the scar tissue?
A. We could only discover two.
Q. You could only discover two?
A. Yes, sir.
Q. You examined the leg last April didn't you?
A. Yes, sir.
Q. You didn't discover any then, did you?
A. We discovered a lot of raw surface then.
Q. Did you discover any nerve endings, or what we call nerve tumors, at that time?
A. No.
Q. These nerve tumors that you discovered are at the point where you discovered these old openings are they, doctor, that is a fact isn't it?
A. Well, no, one of them isn't and one of them is.
Q. And that is the condition that has existed since you last examined the man, last April, isn't it?
242 A. It has been going on, it doesn't develop at once, it is a condition of slow development.
Q. Isn't it a fact, doctor, that if you have an amputation as far up as this, where the shock is so great and the vitality so low, that these nerves keep working down until they form these nerve tumors?
A. That is right.
Q. And when you wish to relieve a person of these nerve tumors, you would have to take off the grafted skin and the true skin on this stump, would you now?
A. Oh, no.
Q. What would you do?
A. I wouldn't take off any,—take off the ends of these nerves and cut them off.
Q. You wouldn't put him under an anesthetic for that?
A. I said it could be under a local—either way.
Q. Would there be any pain under an anesthetic, doctor?
A. No.
Q. No pain at all?
A. The prick of the needle is all.
Q. That is all?
A. Oh, practically.
Q. What is the size of a nerve, tell the jury that?
A. Well, it is in all sizes, sir, from a microscopical to the size of a lead-pencil. The largest nerve is the great sciatic.
Q. What is the size of those that culminate in the end of this stump?
A. Well, I have said the great sciatic is one involved in the stump.
243 Q. Is that involved in any way in his injuries, is the great sciatic nerve in any way involved?

A. Why, it was cut off when the leg was amputated.
Q. Is that the only one that is in any way involved?
A. That is one of them.
Q. That is one that has a tumor?
A. Yes.
Q. Is that the only one that has a tumor?
A. No, sir, I said the anterior crural.
Q. I will ask you then, Doctor, if it isn't a fact that later on there would be a liability of other nerves having tumors, or of that condition?
A. That is possible.
Q. Isn't it a fact that in your practice of medicine and surgery you have found often in an injury of this kind that you have to operate more than once to relieve it, in a case of this kind?
A. Yes.
Q. In fact, you generally must perform more than one operation?
A. I wouldn't say that.
Q. That in the majority of cases, with the irritation existing, you would have to perform more than one operation to relieve the condition?
A. I wouldn't say the majority.
Q. A great many?
A. A good many, yes, sir.
Q. There is then, in your judgment, the liability of recurrence of these nerve tumors often after the operation is made, is there not?
A. Possibly.
244 Q. Well, isn't it probable, Doctor, from your experience as a physician and surgeon, will you not say it is probable?
A. Not of these particular nerves.
Q. Of any other nerves?
A. Oh, there are no other of great size, these are the large ones.
Q. I mean smaller nerves?
A. There is practically complete anesthesia of the superficial nerves, he has practically no feeling.
Q. Yes, but there are other nerves that are small, that there is a probability of recurrence in?
A. I didn't say probability, I said it was possible.
Q. Would you not state it is probable?
A. No, I wouldn't say that it was a probability.
Q. Will you say that it was not a probability?
A. No, I wouldn't say that.
Q. Dr. Hill, these nerves, in order to cut them off, you would have to pull them down you say and then cut them off?
A. Yes, and tie them.
Q. And do you tie them in any way?
A. You stitch over the cut ends, so that it would leave no raw surface.
Q. What is the cause of the recurrence of those then, is that because the nerves keep working their way down into this scar tissue?
A. I wish we knew, we don't know why it is.

Q. Because you don't know what the cause of it is, you don't know if that will recur or not, do you?

A. That is one cause, is working down in the scar tissue.

245 Q. That is one cause?

A. That is one cause.

Q. From your experience you know that they do work down into this scar tissue, don't they?

A. Either that or the scar tissue works up to them.

Q. How?

A. They are caught in the scar tissue.

Q. And your experience as a physician and surgeon teaches you that it is quite a common occurrence in amputations of this character, is that not correct?

A. Not necessarily.

Q. I want to know if you do not know from your experience, of having operated for conditions of this kind, three times on the same leg to remedy these very conditions?

A. I think I do recall a case.

Q. I will ask you if you have not operated four times to relieve this condition, doctor?

A. Well, I think we have reached the limit with three.

Q. You think you have?

A. Yes, I think so, I don't recall any four.

Q. You don't mean to tell this jury now, do you, that you are certain that if this operation was made you wouldn't have to make other operations to relieve the condition that might recur in this leg, do you?

A. Not if it recurs.

Q. What?

A. No, not if it recurred.

Q. Do you want to tell this jury that in your judgment you are certain that it will not recur?

246 A. No, sir, I am not certain of anything.

Q. You then aren't certain that Mr. Otos will regain potency, are you, yes or no?

A. Yes, sir, I am, I am certain.

Q. And yet you just stated that you are not certain of anything?

A. Well, I am sure of that.

Q. Doctor, you stated that you thought this boy could use crutches?

A. Yes, sir.

Q. And that you found nothing wrong with his right leg?

A. I did.

Q. You heard him testify yesterday that he tried to walk upon crutches and fell down?

A. I did.

Q. Could you give the jury any idea or opinion of the cause of his falling, if his right leg was all right?

A. As long as he hadn't been using crutches,—I have seen hundreds of them, it is the commonest of all causes; you never can get a patient out of bed and on crutches with the greatest care. They

have got to learn to walk with them. It doesn't necessarily point or imply that there is anything wrong with the right leg.

Q. Now the fact is, that would be no evidence that there was nothing wrong with the leg, would it, doctor?

A. No.

Q. Now, doctor, isn't it a fact that if the right leg was weak, that that would be one of the causes that caused him to fall?

A. Yes.

247 Q. Dr. Hill, you say these tumors have a very depressing effect and causes one to become very nervous?

A. I say the pain has.

Q. Pain caused from the tumors?

A. Yes.

Q. Did you examine all the reflexes of the right leg?

A. The general, the patellar reflex particularly.

Q. That means on the knee?

A. Yes, and the cremasteric above.

Q. Did you find any reflex in the cremasteric nerve?

A. I did not.

Q. If the reflex is absent, what does that indicate, doctor?

A. Well, it may indicate a great many things, it may indicate nothing, I can tell you what in this case, particularly, if you want to know.

Q. All right, tell me in this particular case.

A. The cremasteric reflex has been explained to the jury, and is produced by an irritation of the inside of the thigh, producing an irritation that causes a contraction of the muscles within the sack surrounding the testicles, causing it to draw up, irritation of the testicle so that it will draw up. If the testicles are up, they can't draw, there will be no reflex, as happened in this case. His testicles are up against the pubes, there is no opportunity for a reflex.

The testicles were not suspended in the sack as they ordinarily are, the man was in bed; there was no reflex or drawing up.

248 Q. You wouldn't expect a reflex from the left side, in view of the operation, would you, doctor?

A. No.

Q. Even if you found it on the right leg, you wouldn't expect to find it on the left leg, taking into consideration this operation, would you?

A. No, not with the pain that he is suffering and the general disturbance.

Q. Do you mean to tell this jury that you would have to remove this pain before you would discover the cremasteric reflex on the right leg?

A. I think so,—I don't mean stopping the pain, but when his testicles are relaxed; we would get them some time when his testicles are not drawn up.

Q. What is the cause of those drawings up?

A. Various, I think in his case the position, being so long in bed.

Q. The fact that he lies in bed?

A. Why, cold is the most common cause; when a man is out in the cold his testicles draw up.

Q. He was in his room when you found him and examined him, he wasn't out in the cold then. You mean to tell this jury that lying upon your back in bed is a cause of causing the testicles to contract?

A. I mentioned that as a probable cause. There is no tension on the muscle at all, and hasn't been for a long time.

Q. Isn't it a fact that when there is no tension they relax rather than contract, isn't that a fact, doctor?

A. Yes.

Q. Isn't it a fact that most persons lying down, that the testicles are not as tense, isn't that a fact?

A. I don't think so.

249 Q. Did you apply the bulbar reflex?

A. I saw Dr. Scheldrup do it.

Q. What was the result of that?

A. I saw no result coming.

Q. No reflex?

A. No.

Q. Now, I will ask you if that isn't one of the tests to determine whether or not a person is impotent?

A. It is one of the tests.

Q. The absence of that reflex is one of the indications of impotency, is it not?

A. It is said to be, yes.

Q. You would say it is, would you not?

A. Yes.

Q. And the absence of the cremasteric reflex is also one of the indications of impotency, is it not?

A. No.

Q. Not at all?

A. I don't see in what way it is.

Q. What?

A. I don't see in what way it would be.

Q. You heard Dr. Scheldrup on the stand state it was, yesterday?

A. I did.

Q. You disagree with him in that regard?

A. Not supplied by any of the nerves that produce the condition.

Q. It is your opinion, doctor, that for a year and four or five months this man has been absolutely impotent, isn't it?

A. I would take his word for it.

Q. Well, you would take into consideration the condition you find?

250 A. Yes.

Q. Beyond the fact that you have his word for it, it would be your opinion from the conditions that you found, that he has been absolutely impotent for a year and five months?

A. I would think so.

Q. You stated a little while ago you weren't certain of anything. I will ask you if you can state to this jury how long it will take that boy to regain his potency?

A. That is a question that is purely problematic; the boy will first

have to regain control of his nervous system, and I would say it is purely speculative, that it would be six months or a year.

Q. Before he would yet have the power of copulation?

A. I would think so.

Q. And it might be two or three years, might it not, depending upon his nervous condition and his vitality?

A. Oh, yes, it might be anything.

Q. It would also depend largely upon the number of recurrences of this nerve tumor condition, wouldn't it?

A. If there were further recurrences.

Q. If there were further recurrences, then the regaining of potency if at all would be further delayed?

A. Yes, sir.

Q. So that you can't tell this jury with any degree of certainty that he will recover within any number of years, can you?

A. I can't specify the number of years.

251 Q. I will ask you, Dr. Hill, if it isn't a fact that a person becoming impotent, as you say he now is, that the longer he stayed in that condition the less liability there is of his recovering potency?

A. Yes, sir.

Q. This man had normal-size testicles, did he?

A. I would consider them not abnormal. That is a condition that varies greatly. I examine forty or fifty men a month and I am surprised at the variation in them.

Q. Were these what you would call small?

A. Oh, no, I wouldn't pronounce them small.

Q. Normal, eh?

A. I would think so.

Q. What is the nerve supply for the rectal reflex,—erector reflex?

A. That comes from the pudic.

Q. That comes from the pudic?

A. Yes, sir.

Q. The pudic nerve is imbedded in this scar tis-ue, is it not?

A. Yes, sir. No, no, the anterior crural is imbedded.

Q. You heard Dr. Scheldrup testify yesterday that the pudic nerve was imbedded in the scar tissue?

A. I certainly didn't, not in the scar tissue.

Q. I will ask you if there is anything the matter with the pudic nerve?

A. I couldn't discover any.

Q. No inflammation?

A. I couldn't discover it.

Q. I believe you heard Dr. Scheldrup testify there was?

252 A. I did.

Q. Was he present when you were there?

A. He was.

Q. Did he call your attention to it?

A. He did.

Q. To the inflammation?

A. He did, I could not feel it, though.

Q. You couldn't feel it?
A. No, I made a rectal examination.
Q. You couldn't see it?
A. I don't know how you could see it.
Q. Does the sympathetic nervous system have anything to do with the power of the sexual organs?
A. Yes, sir.
Q. In fact, it is one of the large factors in the matter, is it not?
A. It is.
Q. I will ask you if that system of the sympathetic nerves is in any way involved in the injury?
A. I couldn't discover any.
Q. Directly or indirectly?
A. I couldn't discover any.
Q. Did you hear Dr. Scheldrup testify that they are badly inflamed, yesterday?
A. That what were?
Q. The sympathetic nerves?
A. I don't recall that.
Q. Tender on touch?
A. Sympathetic nerves,—how in the world would you touch a sympathetic nerve?
Mr. JANES: I don't think the doctor testified to any such thing.
253 WITNESS: If you want to know what my impression is of what he said——
Q. Very well.
A. The pudic nerves were inflamed, he didn't say the sympathetic, he didn't mention them in that connection at all.

Adjournment until 9 a. m.

Mr. JOHNSON: I would like to offer defendant's Exhibit 4, which was the rule book, for which foundation was laid yesterday, with reference to the first paragraph of rule 306, on page 66, and rule 309, at the top of page 67.
Mr. DAVIS: I don't think it is material, either one of them, and not within the issues of this case. If there is any doubt in the Court's mind I would prefer to have them go in, rather than have any error in the case.
COURT: They may go in but I don't see that it is very material.
Mr. DAVIS: I presume that is the only purpose,—that is to enable counsel to argue therefrom, and I presume the court will lay down the law as to contributory negligence. The rules of law will have to apply; I don't see that it is very material.
Mr. JOHNSON: The first rule introduced is: (Reading.)
"306. Each person accepting service does so with a full knowledge of the perils incident to the operation of railways and agrees to exercise the utmost care possible in the performance of his duties to prevent accidents to himself and others. Before using machinery, appliances and tools, employes must examine them and see that they are in a safe condition for service."

254 "309. Any one who is careless of the safety of himself and others will not be permitted to remain in the service of the Company."

E. H. FROST was called as a witness in behalf of the defendant and duly sworn.

Direct examination.

By Mr. JOHNSON as follows:

Q. Where do you reside, doctor?
A. Willmar, Minnesota.
Q. How long have you resided there?
A. 38 years.
Mr. DAVIS: How old are you?
A. 38.
Q. You are a practicing physician and surgeon?
A. Yes, sir.

Mr. DAVIS: Qualifications admitted,—indeed.

Q. How long have you been practicing at Willmar?
A. 15 years.
Q. Were you a physician for the Great Northern Railway at Willmar in September, 1912?
A. Yes, sir.
Q. You are acquainted with the plaintiff?
A. Yes, sir.
Q. Did you see him shortly after his accident?
A. I did.
Q. And where?
A. On the tracks, at the depot.
Q. You are the surgeon that performed the operation on his leg?
A. Yes, sir.
Q. Where is the leg amputated?
255 A. About two inches below the joint; I couldn't give definitely but about that.
Q. How long did you look after him there at that time?
A. One week.
Q. When is the last time that you examined his stump?
A. In April, 1913. Or March, I have forgot which. I was there at Minneapolis at the time of the last trial.
Q. You have not examined the stump of his leg since last April?
A. No, I have not.
Q. You didn't examine it here the other day when the other doctors examined it?
A. I did not.

No cross-examination.

F. H. HACKING was called as a witness in behalf of the defendant and duly sworn.

Dr. FROST recalled.

Cross-examination.

By Mr. DAVIS:

Q. You are the company physician at Willmar?
A. Yes, sir.
Q. And have been for several years?
A. Yes, sir.
Q. Were you a witness in Federal Court when this case was tried?
256 A. Yes, sir.
Q. And testified?
A. Yes, sir.

Dr. HACKING recalled.

Direct examination.

By Mr. JOHNSON:

Q. Where do you reside, Doctor?
A. Granite Falls.
Q. How long have you resided at Granite Falls?
A. A little over 12 years.
Q. Did you practice before that?
A. Yes.
Q. Where?
A. At Wood Lake for eight months and at Raymond for three months, and Chicago for a year and a half.
Q. You are now acquainted with the plaintiff in this case?
A. I met him the last two — three days.
Q. Are you one of the doctors that examined him, and examined the stump of his leg?
A. I am.
Q. Here Monday, last Monday?
A. Last Monday noon.
Q. Do you recollect just where the stump shows the amputation has been performed?
A. We measured it from the trochanter here, the bone that sticks out, two inches and a half below that.
Q. What is that, is that the joint?
257 A. Yes.
Q. Tell the jury in as plain and concise way as you can what you observed with reference to the condition of the stump of his leg.
A. The bone is cut off about two and a half inches below the joint, the muscles behind are quite a bit longer than that, and they were used as a flap to pull up and cover a part of the end and front of the stump, so that the posterior part and part of the lower end

of the stump, is covered with skin and muscles from the back of the leg.

The front end of the leg is covered by a combination of scar tissue and skin graft tissue.

Q. Is it completely healed?

A. Yes.

Q. What condition did you find there as to tenderness or soreness or anything of that kind?

A. The stump is particularly tender at two points or nerve endings of large trunks. The skin area is rather anesthetic, that is, has very slight sensation. He wasn't able to tell us clearly the difference between a pin point prick and the head of a pin, clear over a large part of the skin area. But at two points especially, one in the groin here, where there is a little scar run-ing over almost to the center line, it is an extremely tender point. About the center of the stump, calling this the stump (indicating), about here there is another a little deeper in, an exceedingly tender point.

Q. State what you found to be the cause of the tenderness at those two points?

A. There are two little masses at those points, neuroma, or little nerve bunches at the end of the nerve trunks, and those are
258 little tender spots. Of course then the pain is transmitted along those nerves by them.

Q. Is that the condition you refer to, and that was referred to by the doctors when they stated that the nerve ends were imbedded in the scar tissue?

A. Those little nerve bunches are imbedded in the scar tissue.

Q. What nerves are those?

A. Probably the anterior crural, up here, and the sciatic behind. The stump is a little bit drawn out of normal condition by these posterior muscles. It is probably those two, possibly one other.

Q. Did you examine his back?

A. I did.

Q. State to the jury the result of your examination of his back?

A. He complained of tenderness on very slight pressure, all the way down the back, and getting more intense as we got lower, to the small of his back, over the sacrum is a red area due to pressure of lying on the back.

Q. You have been in court here and heard the testimony in this case?

A. Most of it.

Q. You heard the testimony of the plaintiff as to his symptoms?

A. I heard his testimony.

Q. Basing your testimony on your examination of the man and of his back at this time, what is your opinion as to the cause of that soreness or tenderness in his back?

A. It is partly due to,—the simplest part of it is due to
259 his lying on the back, and producing some congestion there. The condition of the nerve endings being so sensitive, that the slightest touch produces a spasm of the muscles, and that of course would be transmitted along the nerve trunks to where they

join the cord up the back, and keeping those nerve trunks in a state of chronic congestion, it leaves probably some,—possibly some inflammation; the pains in front are transmitted to the back, so that a part at least, and probably most of the pain in the back is due to the irritation in front in my opinion.

Q. What do you mean by saying that it keeps those nerves from the stump up to the back in a chronic congested condition?

A. The condition of the nerve ends, those little bunches on the ends.

Q. What do you mean by saying that the condition is chronic?

A. Well, they have been there now for—the nerve ends have been irritated for over a year.

Q. Is that all you mean by it?

A. Yes.

Q. Where is it that the anterior crural nerve, one of the big ones that you have spoken of as causing tenderness of his stump, where is it that that connects with the spinal column?

A. Not at the spinal column, at the upper part of the lumbar region, that is, with the cord, not with the column.

Q. Well, with the cord?

A. It enters the spinal cord down at the sacral region, but goes up inside the canal and joins the cord itself at the upper
260 part of the lumbar region, several inches higher up. It comes in the canal down here and joins the cord away up here (indicating).

Q. Where is that in the back?

A. The lumbar region is in the small of the back; the sacral region is down in this bony part in the lower part of the back.

Q. Where is the sciatic nerve?

A. Lower than the anterior crural, at the lower part of the lumbar or upper part of the sacral,—the first part of the sacral.

Q. What is known as the small of the back, in common language?

A. Yes.

Q. State where the tenderness and soreness in his back are, especially with reference to the points where these nerves join the cord.

A. Just in the region where these nerves join with the cord, that is the particular tenderness.

Q. Find any evidence of injury to his back in your examination except the condition of this nerve?

Mr. DAVIS: Objected to as leading and suggestive.

Mr. JOHNSON: Question withdrawn.

Mr. DAVIS: Objection withdrawn, go ahead and answer.

A. I couldn't find any evidence—any direct evidence, of injury to the back, beyond what I have testified to.

Q. Did you hear the testimony of the plaintiff as to his symptoms as to nervousness, sleeplessness, waking up with a shock, and those conditions?

A. I did.

261 Q. And pains generally?

A. I did.

Q. Now, basing your opinion on your examination and on the testimony, what in your opinion is the cause of those symptoms, if they existed?

A. The original cause is the injury, which would produce those symptoms in any person receiving such an injury, and receiving such an operation.

In my opinion they have been kept active by the condition that followed the accident in these nerve endings, that those tender points producing the spasm, keeps up to a certain extent the symptoms that were originally started by the injury.

Q. You heard his testimony as to having had no sexual ability or desire since the time of this injury?

A. I did.

Q. Assuming that to be true, what in your opinion is the cause of that?

A. Oh, of course, he naturally wouldn't have any impulse following the accident, for a certain time.

Q. Why?

A. Because of the shock and loss of blood, and the nervous shock, sometimes call it a shock due to an injury, that would of course prevent that for a time and to my mind that has simply been continuous, because there has been a continuous irritation in this stump.

He has never been free, completely, from pain and nervousness long enough for those functions to be restored. They are inhibited, to my mind, that is, lying dormant.

262 Q. I will ask you, have you any opinion as to whether or not the plaintiff is permanently impotent, have you an opinion?

A. I have an opinion, yes.

Q. What is that opinion?

A. I believe that he is not permanently impotent.

Q. You have stated that you believe the condition due to irritation in the stump; what else, what other reason have you for that opinion?

A. Well, these nerves have nothing directly to do with potency, that is controlled by the pudic nerve, which is not involved in the stump at all, or in the tissue.

Q. Did you examine the pudic nerve when you examined him?

A. No, I did not. The pudic nerve is away in the inside of the pelvis except for a very small area that must be found from below, and can't be touched, of course.

Q. What I meant was, did you examine the distribution of functions of the pudic nerve?

A. I did.

Q. Well, tell the jury how you did that and what the result of your examination was, and what that indicates to you?

A. I watched Dr. Hill very carefully as he examined the rectum.

I stood and watched the action of the muscles of the lower bowel as Dr. Hill put his finger on it. The muscle was contracted, and contracted down on his finger so that he had to use force to put it in; that muscle is controlled by the pudic nerve.

263 Later I asked him to pass water, and he started the water with average ease in which persons on their back can. He stopped and asked me if that was enough; I said, no, give me some more, and he passed some more. He stopped again and asked us, is that enough. I said no, you might as well empty the bladder now, and then you won't have to get up soon, and then he passed some more, so that the water was started and stopped three times. That action is controlled largely by the pudic nerve and its branches.

Q. Now then, taking that action and function as you saw it exercised at the rectum and in the passing of the water, what does that indicate to you as to his ability to get an erection of the penis?

A. Well, in those two functions he has at least fair control of; well then, to my mind, he ought to have control of the third function. It may be inhibited at the present time due to the—this third action is one that isn't used very much and it is only used when conditions are right. Of course, we couldn't examine that under those conditions, nobody could under those conditions, and to my mind when those two functions are fairly good, the third one ought to be present to some extent and able to be restored if the other conditions are corrected.

Q. You say, doctor, that his control of the pudic nerve, or the functionating of that nerve, are fairly good, what do you mean by that?

A. It was at least fairly good; he gave a pretty good demonstration of the control there yesterday; if he was standing up

264 then he ought to show better control. Of course anybody standing up would have more control of that nerve than anybody lying on their back, but compared with a person lying on their back, it showed good control.

Q. Was it or was it not normal under the conditions?

A. Under the conditions I would say it was practically normal.

Q. As to the tenderness in his back which you have testified to, have you an opinion as to the permanency of that?

A. Well that depends on the treatment.

Q. I am assuming, of course, with proper treatment?

A. Well, with proper treatment——

Q. I just asked you if you had an opinion?

A. Yes.

Q. Is there a practical method of relieving soreness in the stump of his leg?

A. There is.

Q. Explain to the jury what that is, tell them how it is done and what is the effect of it?

A. That would be the removal of these neuroma, or nerve bunches. The nerve in being cut across, the little filaments will form in bunches; the whole mass of little nerve filaments, as we call them, are surrounded by a sheath like this (indicating). If that is

cut off, it naturally leaves a raw surface, and if that raw surface is imbedded in scar tissue, and only when it is imbedded in scar tissue, then those nerve filaments develop past the sheath and form a mass at the end of that nerve, a bulb. This bulb may, of course, extend to some extent into the sheath by forming this bulb.

265 Q. Doctor, I understood that that was the condition caused, but what I asked you now was, how do you remedy it?

A. In order to do that I have got to explain to make clear what there is there. Now that bulb on the end of the nerve, if that is cut off this way again, it may recur, and that is the way it used to be done until a few years ago, when Doctor Senn of Chicago introduced a new method——

Mr. DAVIS: You are not asked for a clinical lecture, doctor, you will simply answer the question.

WITNESS: This is a very important part.

Mr. DAVIS: I ask it to be stricken out as immaterial and hearsay and not responsive to the question.

COURT: It may stand.

Q. Go ahead and explain, doctor?

A. If the nerve is cut this way (indicating) and we follow the sheath up in here, with the point forward, leaving the sheath down, and that sheath is stitched over the end of the nerve, then if that bulb has been removed, they will never recur.

Q. Now, then, could that operation be performed on this man?

A. In my opinion it could.

Q. What?

A. It could.

Q. State whether or not that operation is a serious one,—whether it is a dangerous operation or not?

A. No, it isn't called a dangerous operation.

Q. Would you have to use or administer a general anesthetic?

A. Not necessarily.

266 Q. How would you do it otherwise?

A. The skin could be anesthetized by a local anesthetic, and then the nerve sheath above that is blocked off by a local anesthetic; then it could be, that way.

Q. Now, then, doctor, what would be the effect in your opinion of that operation if performed on the two bunches of this man's stump, which has been described in the testimony, upon the condition in his back?

A. In my opinion it would remove the cause or the irritational spasms and the irritation there, and those pains,—spasms, are transmitted up the muscles and up the nerves into the great nerves and cord to the back. If that is remedied, then gradually the nerve trunk should subside,—the congestion in the nerve trunks should subside, and the reflected pain in the back should be relieved, provided the secondary cause, the other cause is removed, in getting off his back.

Q. What in your opinion would be the effect of that operation if properly performed on the stump of this man's leg?

Q. Upon the conditions as to nervousness and sleeplessness, and these other pains which he has been testifying to?

A. I think it is largely the cause of that, so I think *it is largely the cause of that, so I think* they ought to,—they should be very largely relieved.

Q. Then doctor, what in your opinion would be the effect of this operation if properly performed upon the stump of this man's leg, upon his lack of sexual ability, if that condition now exists?

267 A. It ought to materially aid it.

Q. In what way?

A. May I give just a word of explanation as to the cause of it.

Q. I want you to explain to the jury how it would do that?

A. These nerves down here (indicating) that impulse or telegraph to the cord and to the brain, and after that it comes back from the sympathetic system to all his organs in the body. The sympathetic nerve systems control the organs of the body. This sympathetic nervous system has been telegraphing pain symptoms all the time, to these organs, and interfering with their function and action. Now, if that message is shut off to those organs, they will gradually get back, well, to a partially normal, condition at least, I would say,—I don't know how much more.

Q. Did you hear the testimony of Dr. Scheldrup?

A. I did.

Q. Did you hear his testimony to the effect that the absence of the cremasteric reflex was a sign of impotency?

A. I did.

Q. What is your opinion on that?

A. It is one sign of impotency, not necessarily positive, but it is a sign.

Q. Did you find it absent in this case?

A. I did.

Q. Why, do you think it is absent?

A. In my opinion it is due to the fact that the cremasteric muscle is now retracted and can't retract further; the scrotum is

268 drawn right up and can't contract much further.

Q. Now doctor, what is your opinion as to the length of time that it would take to effect these recoveries after the operation is properly performed?

A. Of course, that is a hard question.

Q. But we are asking for your best judgment?

A. But in my judgment when you remove the cause, then at once you remove some of the effects of that cause, and those effects, unless they are organic in nature, ought to be restored, and gradually then that other conditions were restored. Then I believe that the first thing that he knows he will get those functions, and then when he gets a little bit of that function, then he will gradually by his mental control increase that function.

Cross-examination.

By Mr. DAVIS:

Q. Doctor, in other words then, you would have him wish an erection, is that what you mean?

A. Yes, I would.

Mr. Johnson: Objected to as not proper cross-examination.

COURT: Objection overruled.

A. Yes, I would.

Q. Now, Doctor Hacking, you have heard the testimony in this case of Dr. Scheldrup on the stand?

A. I did.

Q. Did you examine to ascertain if the pudic nerve was involved, in this injury?

A. I did not.

269 Q. You heard him testify that it was, and inflamed?

A. I heard him testify that it was sore.

Q. Did you not hear him testify that it was inflamed?

A. In my opinion it was that it was sore, that is what he told us at the examination.

Q. Has the pudic nerve anything to do with the question of impotency?

A. It has.

Q. Doctor, assuming that this boy since the time of his injury hasn't had an erection or copulated, or had any desire for copulation, you would say then that at the present time he is totally impotent, would you not? You would have to say that, doctor, wouldn't you, the same as Dr. Hill did?.

A. The question is "totally," let me understand the word "totally," will you? Do you mean permanent, by that?

Q. I mean now he is totally, you know what totally means?

A. Yes.

Q. He is totally impotent now?

A. At the present time, yes.

Q. In your opinion that condition has existed for a year and four or five months?

A. Yes.

Q. Of total impotency?

A. Yes, sir.

Q. I will ask you if it is not a fact, the condition arising of total impotency and continuing for a long continuing time, don't tend to become chronic?

270 A. Yes, sir.

Q. And also permanent?

A. Yes, sir.

Q. I will ask you if it is not a fact that the leg being healed, as you say,—the stump is entirely healed?

A. Yes, sir.

Q. I believe the testimony shows healed last July?

A. Yes, sir.

Q. Wouldn't you then expect, doctor, upon taking into considera-

tion everything, that he would have had some erection, owing to the stump being healed, if he was not permanently impotent?

A. I don't think the healing of the stump had very much to do with it, the condition of those nerves has much more, that one factor has much more to do with it.

Q. Now, doctor, the cremasteric reflex is one of the tests or indications of impotency?

A. Yes, sir.

Q. The absence of that cremasteric reflex is an evidence of impotency?

A. Well——

Q. One of the indications?

A. The permanent absence is, yes.

Q. Well, at the examination you made of this man you found it absent, did you not?

A. Yes, sir.

Q. And you will not state to this jury you have any reason to believe it is present, will you, doctor?

A. No, sir.

Q. Consequently, finding a condition to exist in medicine as absent, the assumption of medicine will be that this condi-
271 tion which caused it continues, wouldn't it, doctor?

A. Not necessarily, no, sir.

Q. You can't tell this jury any reason why you think it is present, can you, having found it absent?

A. No, sir.

Q. What is the bulbar reflex test, that is, what is its purpose?

A. That is one test for impotency.

Q. And the absence of the bulbar reflex indicates impotency, does it not, one of the indications of impotency?

A. One of the indications, yes, sir.

Q. I will ask you, if that bulbar reflex is absent, no reflex, there is no likelihood of its ever being present is there, doctor?

A. Not necessarily.

Q. That is a fact, isn't it, doctor, that the bulbar reflex being absent, there isn't any likelihood of it again being present, under any conditions, isn't that correct?

A. I wouldn't say that it couldn't be.

Q. No, because all things are possible, in medicine?

A. No, broader than that.

Q. Now, doctor, isn't the absence of the bulbar reflex taken by you medical men as one of the indications of permanent impotency, isn't that a fact?

A. Well——

Q. Please answer that by yes or no, if you can.

A. I can't, I will tell you why if you wish.

Q. Well, why?

272 A. Because I haven't read up on that particular point enough.

Q. You knew you were going to be an expert on that particular

important question of whether or not this man was permanently impotent, haven't you?

A. Yes, sir.

Q. You have talked the matter over several times with Dr. Hill?

A. Yes, sir.

Q. Doctor Hacking, are you able to state to this jury whether or not the absence of the bulbar reflex is an indication of permanent impotency?

Mr. JOHNSON: Objected to as not proper cross-examination.

COURT: Overruled.

A. In my opinion it isn't a necessary—not necessarily impotent even if that is gone.

Q. I didn't ask you that. I asked if you were able to state to this jury if the absence of the bulbar reflex is not one of the indications of a condition of permanent impotency?

A. That is a different question from what you asked before, I can answer yes to that.

Q. That is one of the indications?

A. Yes, sir.

Q. That indication you find present in this boy?

A. Yes, sir.

Q. You have nothing upon which to base your opinion that it is present or will be present at all, have you?

A. No.

273 Q. I think you stated that if this nerve or stump was operated upon, these two nerve tumors,—they are nerve tumors, aren't they?

A. Yes.

Q. —Were removed, that this pain would cease, did you?

A. No, I said that the cause, the most important cause of the pain would be removed.

Q. And there will be still pain remaining in that stump, wouldn't there?

A. There might be, probably would be.

Q. As long as he lives he would suffer pain in that stump, would he not, doctor, in your opinion?

A. Oh, I don't know.

Q. What is your best judgment, give it to the jury please, doctor?

A. Well, he would have pressure pains to some extent, yes, it would be more tender, of course, than the other one.

Q. And then when he was moving, or trying to move around, naturally it would cause him pain, wouldn't it?

A. The contraction of the scar would cause him pain.

Q. And you think he would also have pain on pressure, don't you?

A. Nothing like what he has now, because the skin is anesthetized.

Q. He would still have pain?

A. He might have some pain, yes.

Q. It is your best judgement that he would, isn't it, Doctor?

A. Yes, to some extent.

Q. As long as he lives, isn't that correct, Doctor Hacking?
274 A. There are so many who don't have much, being in a similar condition.

Q. That is a very unusual operation, isn't it, doctor? This operation on this boy of his leg being taken off at the point it was?

A. As high up as that? Yes.

Q. It is considered by surgeons as a very serious operation?

A. Yes.

Q. A great proportion of men sustaining such an operation do not survive the shock and the operation, isn't that a fact, Doctor Hacking?

A. Yes.

Q. Doctor Hacking, in order to operate I think you stated it was not necessary to give him a general anesthetic?

A. I said not absolutely necessary.

Q. I will ask you if you as a practicing physician and surgeon were going to perform that operation, if you would give him a general anesthetic?

A. I would unless there was an indication of danger from a general anesthetic.

Q. Indication of danger would be of course either lung trouble or heart trouble?

A. Yes.

Q. In taking either ether or chloroform?

A. Yes.

Q. To avoid any trouble with this boy?

A. Yes.

Q. Consequently, if you were going to perform that operation you would put him under a general anesthetic, wouldn't you?

A. Yes, I should advise that.

275 Q. You would do that if you were performing the operation?

A. I would advise that being done.

Q. I understand, you would advise that as the proper method?

A. Yes, I would advise that.

Q. Can you use a local anesthetic in scar tissue; if so, tell the jury how it will act on scar tissue instead of true tissue?

A. You don't get good action.

Q. Do you get any action on scar tissue, Doctor?

A. Yes, sir, you do.

Q. Scar tissue is dead skin, or what is it?

A. No, it is not.

Q. What is scar tissue, tell the jury?

A. Scar tissue is a modification of true skin,—it is a substitute for true skin, it is not a dead skin by any means, it is perfectly alive.

Q. In removing these two tumors here on the stump,—you heard the testimony of Dr. Hill?

A. Yes.

Q. That he discovered one of these tumors was at a point different than the ulcers were last spring?

A. Yes.

Q. That fact would in your opinion indicate that this nerve had worked its way down into this scar tissue or flesh?

A. It would, yes.

Q. Resulting in a tumor?

A. Yes.

Q. You are not able to state to this jury, with any degree of certainty that more of these nerves, among which there are
276 numbers of them, would not work their way down into that place, are you?

A. I know that these neuroma have formed on the nerve trunks, not on the small filaments.

Q. How many small trunks are there terminating in the stump there?

A. There is the anterior crural and the great sciatic, are the two most important ones; there are some branches of those.

Q. They will result in tumors?

A. They are cutaneous nerves, they are anesthetized, under my testimony, Dr. Hill's and Dr. Scheldrup's those cutaneous nerves are anesthetized, they wouldn't trouble you any. We have the obturator nerve, way in deep, which is in all probability not involved in the scar.

Q. And those are the nerve trunks that are in there, that is all?

A. Yes, sir.

Q. Do you mean to tell this jury then,—I will take that back——

A. And over above, the iliohypogastric and the ilio-inguinal going together in there, might possibly be involved.

Q. Is that all?

A. That is all.

Q. And are you quite certain that those two other nerves are involved in this injury? Are you quite certain the last two nerve trunks you mentioned are involved in this injury? Is that your opinion that they are?

A. I don't know whether they are involved or not.

Q. What is your best judgment, give that to the jury?

277 A. Well, that one up here maybe, the iliohypogastric.

Q. In your opinion then that is involved in this injury?

A. It may be.

Q. Isn't it your opinion that it is?

A. There are two of them, it is a question of which two it is of those three.

Q. It is your opinion that one or the other of them is involved in this injury, not that it may be but that it is from your judgment as a physican, isn't it, doctor?

A. Well, as I stated before, the stump is deformed, the tissues are deformed, and those nerves are retracted and they are out of place. I am not prepared to say which two of those three trunks are involved.

Q. But it is your opinion that two of the three trunks you mentioned are involved in there?

A. Yes, sir.

Q. But you can't tell which ones exactly?

A. Not surely.

Q. Now doctor, did you ever have occasion to perform an operation such as you suggested that you would do to relieve this condition?

A. I have not.

Q. Did you ever have occasion to perform the operation such as was performed on him, amputating the leg at that point?

A. No, sir.

Q. Your practice has been largely devoted to medicine rather than surgery, hasn't it, doctor?

278 A. Well, during the first—for a little over a year in Chicago I was assistant surgeon at the Norwegian Hospital, I saw quite a lot of that practice.

Q. Since that it has been practically devoted to medicine?

A. Since that time I have been in general work, including surgery. In the hospital Dr. Scheldrup and I had at Granite Falls we had occasion to do some amputations.

Q. How long ago was that?

A. From 12 to 10 years ago, those two years.

Q. Did you quit the hospital then?

A. After that it was sold, and then burned.

Q. How is that, sold and——

A. Sold, and then burned, after the hospital was closed, a year after the hospital was closed.

Q. Doctor, you stated these nerves came out in the sacral region of the back?

A. They come out of the spinal column.

Q. Near the sacral region?

A. Yes, sir.

Q. The sacral region around there is what is known as the sacro-iliac joint?

A. Yes, sir.

Q. That has a certain function in allowing a limited motion of the back hasn't it?

A. Exceeding limited.

Q. As a matter of fact, its purpose and its function are not thoroughly understood by the medical profession at the present time, are they?

A. It is hardly a joint, it is more a syncondrosis.

Q. What does that mean in English?

A. It is a joining like this (indicating). A joint will be this way (indicating).

279 Q. Doctor, I will ask you this, if it is not a fact and it is not your opinion that a person getting his leg caught by a guard-rail, being run over by a car, throwing himself out away from the car onto the ground to save his life, and his leg being torn down until his leg below his knee is torn off,—if in your opinion it isn't a fact that his back, and the sacral region of his back, would be very likely to be injured?

Mr. JOHNSON: Objected to as assuming a state of facts not in evidence, and not proper cross-examination.

Mr. DAVIS: Question withdrawn.

Q. You have heard the testimony of the plaintiff as to how he was injured?

A. Yes.

Q. I will ask you if it is not a fact, taking into consideration all the circumstances I have stated as to his injury and his getting away from that car, saving his life and throwing himself out, if it isn't a fact in your opinion that he would be very likely to sustain a serious injury to the back at the sacral region.

Mr. JOHNSON: Objected to as speculative, calling for the conclusion of the witness and not proper cross-examination.

COURT: Overruled.

Q. Your answer?

A. In my opinion, according to the evidence that I have seen here, he would have to be thrown forward, not backward, or sidewise,—he would have to be thrown forward, according to the law of physics.

Q. Answer my question,—having given that information.

(Question read.)

280 Q. Answer that if you can, yes or no, doctor? Will you kindly answer that by yes or no, if you can?

A. I can't.

Q. You can't?

A. No, not without modification. I don't think I can.

(Question again read.)

A. No, I don't think it is very likely that he would, no.

Q. Doctor Hacking, you were asked by Mr. Johnson to state how long,—if you were able to state how long it would be before these conditions were removed. I don't think in answering the question you did answer that?

A. No, I guess I didn't.

Q. I will ask you if it is not a fact that you would simply have to hazard a guess, that would be all, as to how long it would be? It would be a mere guess, wouldn't it, Doctor Hacking?

A. Well, a little better than a guess, probably, but it would be an opinion on that.

Q. Well, all right, that opinion of course would depend upon a great many things, wouldn't it?

A. Yes, sir.

Q. It would depend upon whether or not there was a recurrence of these tumors?

A. I stated there wouldn't be a recurrence if they are operated on right.

Q. You heard Dr. Hill on the stand yesterday?

A. Yes, Dr. Hill you know has been operating on those for twenty years.

Q. You heard him say that there was a liability of recurrence, didn't you?

281 A. In his practice of 30 years there probably would. In the operations that he does lately, no.

Q. He is still working at it, isn't he?

A. I say the operations that he does lately on them, no recurrence. I am sure of that.

Q. You know he stated that there would be a liability of recurrence, didn't you?

A. He said there might be.

Mr. JOHNSON: Objected to as an improper statement of his evidence.

Q. All right. Now, Dr. Hacking, the question of whether or not this man would ever regain his potency depends upon a large number of conditions, does it not?

A. Yes, sir.

Q. It would depend upon his regaining his normal nervous condition and health largely, wouldn't it?

A. Not necessarily normal condition.

Q. It would depend upon a great improvement in his nervous condition?

A. Yes, sir.

Q. And it would depend upon a great improvement in his stump as to pain and suffering, wouldn't it?

A. Yes, sir.

Q. It would depend upon a great improvement as to the condition of his back as to pain and suffering, wouldn't it?

A. Yes, sir.

Q. It would depend upon various number of other conditions, would it not?

A. Some others, yes.

282 Q. Now I will ask you, if as a medical man you are able to do more than hazard a guess upon the question, Doctor Hacking, as to how long it will take that boy, if ever, to regain his potency, having lost it?

A. In a court case, where he has been impressed so strongly upon his mind that it is permanent, there is less chance.

Mr. DAVIS: I will ask that that be stricken out as not responsive. I didn't ask you to volunteer testimony.

COURT: Motion granted.

(Question read to witness.)

—. You can answer that by yes or no?

A. It would just be an opinion.

Q. Give the jury your opinion, let us have it?

A. Of what?

Q. How long it will take to regain his potency, having lost it. Tell the jury.

A. It is pretty hard to explain it without the reasons.

Mr. JOHNSON: Give the explanation.

A. In my opinion, if those main causes are removed, that he should gradually, within one year, get some restoration of that function, and if he gets some, then he will know he has some, and if he gets that, then it may on very short notice be restored enough for the function to be active.

Q. But, doctor, that is all based upon an "if"?
A. Yes, sir.
Q. Doctor Hacking, the pudic nerve, I think you said, has something to do with the question of impotency?
A. Yes, sir.
283 Q. If there is no bulbar reflex, that indicates an impairment of the pudic nerve, would it not?
A. An impairment, yes, sir.
Q. And the pudic nerve is one of the nerves, the chief nerve, having to do with the question of erection?
A. Yes, sir.

Redirect examination.

By Mr. JOHNSON:

Q. Did you apply the bulbar reflex yourself?
A. I did not.
Q. You don't know then whether it was missing or not?
A. I saw it done.
Q. Now, doctor, you said this plaintiff might continue even after the operation you have described, to have some pain?
A. He might, yes, sir.
Q. I will ask you what would be the extent of that pain as compared with his present pain, in your opinion?
A. Comparatively little, compared with his present.
Q. Doctor, you just stated that the absence of the bulbar reflex indicated an impairment of the nerve, do you mean by that that it indicates any diseased or organic defect, or merely a functional impairment?

Mr. DAVIS: Objected to as leading and suggestive, I think he should be asked what it indicates, Your Honor.
COURT: Objection overruled.

284 A. Not necessarily an organic change at all.
Q. Well, what is your opinion?
A. In my opinion it is a functional impairment, due to these other causes.
Q. What would you say, doctor, as to the reliability of the reflex itself?
A. No reflex itself is reliable. There are many exceptions.
Q. The absence of it is also only a guess as to the effect of it?

Mr. DAVIS: Objected to as argumentative and leading.
COURT: Sustained.

Recross-examination.

By Mr. DAVIS:

Q. That functional derangement will lead to permanent conditions afterward if more continued?
A. More or less permanent.

Q. The longer a functional difficulty exists the more likelihood there is of a permanent condition ensuing?
A. Yes, sir.

HENRIK TILLISCH, was called as a witness on behalf of the defendant and duly sworn.

Direct examination.

By Mr. JOHNSON as follows:

Q. Where do you reside, doctor?
A. Canby.
Q. How long have you resided there?
285 A. About 12 years.
Q. During that time what line of work have you been engaged in?
A. Physician and surgeon.

Mr. DAVIS: Oh, yes, qualifications admitted.

Q. Doctor, state generally your experience as to surgery, from the start down to the present time.
A. I have had approximately two years' hospital service, and the balance of the time I have done general practicing, including the treatment of ordinary ailments, and have done a large part of the surgical work which has occurred in the practice, and come up in my practice.
Q. Did you examine the plaintiff last Monday?
A. I did.
Q. Did you examine the stump of his leg where it has been amputated?
A. I did.
Q. And where is that amputation?
A. About two inches, a little over, below the joint.
Q. Tell the jury in what condition you found the end of the stump, the stump of his leg?
A. The lower half of the stump was covered with true skin, which was secured by a pulling over of the muscles of the buttock. The upper half was composed of grafted skin and scar tissue. The skin over the grafted skin, and scar tissue, had less sensibility than ordinary skin. I found two points exquisitely tender, just the barest touch would throw the leg, or the stump of the leg, into a spasm, and every time the pressure was more than just very superficial, the young man would flinch with pain, and ask us to be careful, or something to that effect.
286
Q. Now doctor, what in your opinion is the cause of that sensitiveness?
A. I am positive of the fact that that sensitiveness in the stump is due to the enlargement of the nerve endings, and the fact that the two large nerve trunks are imbedded in the scar tissue.
Q. Over what area does that pain and sensitiveness extend?
A. The sensitiveness is obtained only by pressure upon these nerves, upon these exact points, although pain is always reflected,

radiated, from that point over the space of a few inches in each direction, so that we can say the whole upper half of the stump is exquisitely tender.

Q. How far up the nerve does the pain extend?

A. The pain radiates clear up to the origin of the nerve. In this case the nerve originates in the small of the back.

Q. What are these two nerves?

A. I believe the two nerves involved here are the anterior crural, which takes its origin in the small of the back, posteriorly or behind, and the great sciatic nerve, the largest nerve trunk in the body, which takes its origin from the very lowest part of the back, of the spinal column.

Q. Did you examine his back?

A. I did.

Q. What condition did you find it in?

A. The young man flinched wherever I touched him, whether it was in the back of his head, the point of the shoulder or wherever, as though he was prepared for pain every time.

287 Mr. DAVIS: I will ask that it be stricken out as not responsive.

COURT: That part may be stricken out.

Mr. DAVIS: You were asked as to where you examined the back, that is all you were asked, Dr. Tillisch.

A. I kept this up for some time, and I found that the most flinching and the most pain was in the lower part of the back, over the spinal cord, the small of the back.

Q. What did that indicate to you, if anything?

A. It indicated to me that it was the point of soreness.

Q. What in your opinion was the cause of that soreness?

A. I believe that the soreness was due to the irritation, and pain of these nerve trunks which were mentioned, the anterior crural and the great sciatic.

Q. Where, what soreness?

A. The soreness down in the stump, which was referred to the small of the back where these nerves take their origin.

Recess.

Q. Doctor, you have heard the testimony in this case?

A. I have.

Q. And you examined this man?

A. I have.

Q. Did you hear his testimony as to having nervousness, and sleeplessness, and waking with a fright, and so on?

A. I did.

Q. Now, assuming those conditions to be as he described
288 them, in your opinion what is the cause of that condition?

A. I believe that the nervous symptoms of which he complained are due to two factors, first, to the shock, both mental and physical, of his injury and subsequent operation, and secondly, that is kept up by the constant and excruciating pain which this young

man is suffering from, and which he has suffered from and which he is suffering from now.

Q. Where?

A. In the stump.

Q. Due to what?

A. In the stump, due to the imbedding of the nerve trunk in the scar tissue, and to the neuromata or the little bunching on the end of the nerve trunks.

Q. Assuming that he has had no and has no sexual desire or ability since the time of the accident, as he testified to how do you explain that condition?

A. I believe that the loss and absence at the present time of sexual desire is also due to two conditions, the first is the extreme depressed, nervous state which the injury and subsequent operation caused him, and the fact that he is constantly, as he testified to, suffering more or less excruciating pain.

Q. Doctor, have you or have you not an opinion as to whether his present condition as to sexual impotency is permanent or not?

A. I have.

Q. What is that opinion?

A. My opinion is that it is not permanent.

289 Q. Why?

A. I believe that it is not permanent because it is not natural, nor would you expect any individual suffering excruciating pain more or less constantly, and whose nervous system is depressed to such an extent as this young man has testified to that he is, and which we found to be so from examination,—you would not expect sexual desire under the circumstances.

Q. Now, doctor, is there a practical way of remedying those conditions?

A. I believe there is not.

Q. What is it?

A. I beli-ve that if the nerve trunks imbedded in the scar were freed from this entanglement, and the nerve resected or cut off higher up, that the pain, the constant excruciating pain from which he is suffering now and which he has suffered from during the past year or year and a half, were removed, that the whole condition would be relieved, saving the fact that there would be a little tenderness in the scar tissue.

Q. Well, I specially refer to his sexual condition, what would be the effect of such an operation?

A. I believe that, when the cause of his nervousness was relieved, as could be by this operation, that his sexual desire would return; it it is my opinion positively at the present time that it will return.

Q. What would you say as to the effect of such operation upon the condition of his back, which you have testified to, and why?

A. I believe that when this operation is done, the pain in

290 the lower part of the spine will be relieved, which will allow him to get off his back, when the sensitiveness in the muscles will be relieved by getting off his back.

Q. What nerve is sexual ability dependent upon?

A. The pudic nerve.

Q. Did you make any examination or tests as to the condition of the pudic nerve?

A. I tested all the functions of the pudic nerve which it was possible for us to test, but the nerve trunk itself I didn't test, because of its locality, it is impossible to test it.

Q. I wish you would explain to the jury what tests you made, how you made them and what was the result of that examination?

A. The pudic nerve controls, among other things, the throwing of a stream of urine, and the stoppage of that stream; first we tested this by having him pass his urine in our presence, in a bottle, lying on his back. He stopped it and started it at will. After a moment he stopped it and asked if that was enough, he stopped it immediately, showing that the branches of this nerve which control the stopping and the throwing of a stream, were in perfect order.

Dr. Hill tested the rectum, the sphincter muscle, which controls the rectum, in my presence, and I watched it very closely, and the sphincter contracted right down on the finger, showing that that was in perfect order. This rectal muscle is also supplied by the pudic nerve. Thirdly, the erector penis muscle, which is the muscle which controls the mechanical act of an erection, is also supplied
291 by branches from this pudic nerve; obviously I couldn't test that.

Q. Well, from the tests and the examination you made, what is the conclusion you come to as to the condition or state of the pudic nerve?

A. As far as I can tell from my examination, I believe that the pudic nerve and its functions are not injured,—is not injured, rather.

Q. Is there a practical way to remedy these conditions?

A. What conditions?

Q. The soreness in the stump and back, and his nervous condition?

A. As I have testified to before, I believe that if the nerve endings are released from the scar tissue and that nerve is resected or cut off higher up, and the stump of that nerve treated as it should be, that it would relieve the symptoms of pain in the stump, and by relieving the symptoms of pain in the stump, the sensitiveness and sleeplessness would gradually improve. His nervous condition as a whole would improve, and by removing the constant irritation in these nerve endings, the soreness which is left in the lower part of the spine at the point where these nerves take their origin, would clear up. It would allow him to get off from his back and to use crutches, and get out of doors, and so much faster as he could get out and around, he would be encouraged and get over the depressed nervous state in which he is at present, and he would improve rapidly.

Q. Now doctor, is that operation which you deem necessary there, a dangerous operation?

292 A. It is not.

Q. Is it a common or uncommon operation?

A. Well, amputations of the hip are not common, in the ordinary

sense of the word, but it is commonly done, it has nearly always been necessary to do wherever there are neuroma, or we leave our patient in a state of chronic invalidism.

Q. What would you say as to the necessity of an anesthetic in the case of such operation?

A. It could be done without a general anesthetic. It could be done by first anesthetizing the skin with a local anesthetic, and blocking the nerve; my personal preference would be for a general anesthetic.

Q. When in your opinion could this operation be performed, or when could it have been performed?

A. I believe that it could have been performed as soon as the stump was healed over. I believe that it should have been performed when the stump was healed over.

Q. Did you examine the right l[illegible]

A. I did.

Q. What condition did you find that in?

A. With the exception of a slight exaggeration of the patellar reflex I found it normal.

Q. What did that indicate to you, if anything?

A. It indicated to me that there was no injury in the spine; had there been an injury in the spine it would have affected the nerves on both sides.

Q. There has been some testimony here, doctor, as to the absence of the cremasteric reflex, what have you to say about that?

293 A. We made an attempt to get the cremasteric reflex but were unable to get any reflex because,—and I believe it has been explained to the jury, that is, the drawing up of the scrotum.

Q. Just a minute, I will ask you so that you can explain yourself,—why, if you know, did you fail to get the cremasteric reflex?

A. We couldn't get a reflex because the skin of the scrotum was drawn up tight already, and that constitutes the reflex, when the skin is relaxed and we rub the inner side of the thigh, the skin draws up. It had already been drawn up.

Q. Doctor, did you examine the plaintiff's urine at the time?

A. I did.

Q. What condition did you find it in?

A. I found the urine in normal condition.

Q. Did you find any blood in it, or anything that didn't belong there?

A. I did not. Do you want me to give the complete urinal findings?

Q. Just tell how you find it, as to a generally healthy or unhealthy condition?

A. In detail?

Q. Well, just state generally.

A. We found the urine of amber color, clear, specific gravity 1028; we found no albumen, in two tests, the ordinary test and the more delicate test that we use for detecting traces, were used. We found no sugar. We made a microscopic examination and found

no pus cells nor casts. These things denoted to me that the kidneys and bladder were functionally healthy.

294 Cross-examination.

By Mr. DAVIS:

Q. Doctor, when did you first know you were to be a witness for the Great Northern?

A. A few days before the trial. I knew I was to be a witness, I didn't know that it was for the Great Northern.

Q. It was at the request of Mr. Lende or Mr. Johnson that you came here?

A. Yes, sir, Mr. Johnson.

Q. Dr. Tillisch, you live at Canby?

A. I do.

Q. On the North Western line?

A. Yes.

Q. You don't live on the Great Northern?

A. No.

Q. You have never been in the employ of the Great Northern Railway?

A. I have not.

Q. This is the first time that you have ever appeared as a witness for them?

A. It is.

Q. Doctor Tillisch, you don't know Harry Otos, the plaintiff?

A. I met him Monday, that is all.

Q. You didn't know him before you were called as a witness?

A. No.

Q. Doctor, I will ask you this, you testified that this man in your opinion has been suffering excruciating pain from the time of his injury until the present time and is still suffering it?

A. I did.

295 Q. I will ask you if these nerve tumors,—if it isn't a fact that in operating to remove them, that oftentimes there is a recurrence, as Dr. Hill testified?

A. Not as the operation is done now.

Q. Not at all?

A. Very rare.

Q. You heard Dr. Hill?

A. I heard him so testify.

Q. Did you ever operate on any of those in your life, doctor?

A. I have never had a neuroma in my amputations.

Q. Did you ever operate for an amputation that close to the hip?

A. Approximately.

Q. Did you ever have an operation to remove what is known as a neuroma?

A. No, sir.

Q. So that your experience on that is quite limited, you depend entirely upon your opinion?

A. I have seen other men operate.

Q. Have you observed the condition of those operations afterwards?

A. Yes, sir.

Q. You never have operated yourself?

A. No, sir.

Q. You heard Dr. Hill testify that he had operated?

A. Yes, sir.

Q. Dr. Tillisch, with reference to the pudic nerve, that is the nerve that has largely to do with the function of erection?

296 A. Yes, sir.

Q. I will ask you if it isn't a fact that there is some impairment, in your opinion, of the pudic nerve?

A. I found none.

Q. Did you see the bulbar reflex applied?

A. Yes, sir.

Q. The absence of the bulbar reflex indicates an impairment of the pudic nerve, as testified to by Dr. Hacking and the other doctors, does it not?

Mr. JOHNSON: Objected to as an improper form of question.

Mr. DAVIS: Including the statement of other witnesses?

COURT: Objection overruled.

Mr. DAVIS: I withdraw "including the statement of other witnesses," and I will ask it just the way it is.

Q. The absence of the bulbar reflex indicates an impairment of the pudic nerve, does it, as testified to by Dr. Hacking?

A. It is one of the indications.

Same objection. Objections overruled.

Q. That is one of the indications of impairment to the pudic nerve, the absence of the bulbar reflex?

A. Yes, sir.

Q. So that, not having examined the nerve itself, and having the fact that the bulbar reflex is absent, the conclusion would be that there was some indication of impairment to that nerve, would it not?

A. Not necessarily.

Q. Wouldn't that be one indication of it, I say,—I don't say to be positive?

297 A. It would be an indication.

Q. You didn't examine the nerve itself?

A. That is an impossibility.

Q. The absence of the bulbar reflex is evidence of an indication of total impotence, is it not?

A. Very slight indication.

Q. And the absence of the cremasteric reflex is another indication of impotency?

A. I don't believe it is.

Q. Why did you apply it then?

A. We tested all the reflexes of the body that we could.

Q. What was your purpose in making the cremasteric reflex test if it wasn't to determine impotency?

A. For the same reason as I tested the patellar reflex, I wanted to get all of the reflexes of the body.
Q. You didn't test all the reflexes of the body did you?
A. All the ordinary reflexes.
Q. Is the cremasteric reflex an ordinary reflex?
A. Yes.
Q. Will you tell this jury that in your opinion the cremasteric reflex is not any indication of impotency?
A. Yes, sir.
Q. You made that test?
A. Yes, sir.
Q. And that is made down near the testicle?
A. Yes, sir, on the groin.
Q. Near the pudic nerve?
A. On the groin.
Q. And the absence of that reflex has nothing to do with
298 the question of impotency?
A. No, sir.
Q. Your only reason for making it, as I understand you, was to find out the general condition of his nervous system?
A. Correct.
Q. The absence of the cremasteric reflex is simply evidence that his nervous condition is not correct, I presume?
A. Well, we couldn't——
(Question read.)
A. Yes, sir.
Q. Dr. Tillisch, at the present time and at all times since this boy received this injury, I will ask you if it isn't your opinion that this boy has been totally impotent?
A. I believe he has.
Q. Now, having continued totally impotent for a year and nearly five months, I will ask you if it is not a fact that the longer a condition of that kind remains, the greater the liability of becoming permanent?
A. Yes, sir.
Q. I will ask you also, Dr. Tillisch, if it is not a fact that your opinion that he may regain his sexual capacity does not depend upon a great many conditions that may ensue?
A. Yes, sir.
Q. In other words, you do know and have known of cases, and read of cases, where there have been operations to remove these tumors, where they have recurred?
A. I have read of cases, yes.
299 Q. You wouldn't want to say to this jury that you are absolutely certain as a matter of medical knowledge that they would not recur, would you, Dr. Tillisch?
A. No.
Q. Then, doctor, as I understand you, the question of his regaining potency would depend, of course, upon the probability or possibility of recurrence, to some extent, wouldn't it?
A. Yes, sir.

Q. And then the question of injury to his back, is caused, as I understand, by these nerves that are involved in the stump?

A. Yes, sir.

Q. Of course if they recur that naturally would delay the repair of the back?

A. Yes, sir.

Q. And that of course would have its consequent effect upon the regaining of potency, if he ever regained it, wouldn't it?

A. Yes, sir.

Q. And those things are all largely a matter of speculation, are they not, Dr. Tillisch?

A. Well, it is a matter of reasonable probability.

Q. And those questions of reasonable probability depend upon a great many conditions?

A. Yes, sir.

Q. Doctor Tillisch, his nervous condition having existed for a year and five months, and such condition having been accompanied with great excruciating and constant pain, as you have testified to, it would take longer for him to regain his normal condition,
300 or the condition of the normal nervous condition, than it would if he hadn't been suffering so long, wouldn't it?

A. Yes, sir.

Q. The length of time that he has been suffering this pain and enduring this agony, would have the effect to delay the repair of those functions?

A. Yes, sir.

Q. Doctor Tillisch, it is a fact, is it not, that in your judgment he would have to regain practically a normal nervous condition, and practically the normal condition of his back, and practically the normal condition of his stump, before there would be in your judgment any improvement in his sexual function?

A. Oh, no.

Mr. JOHNSON: Objected to as assuming an impossibility.

COURT: Overruled.

A. No.

Q. Does it depend to any extent on that?

A. I believe that as his nervous condition approximately—that is, as that improves, just to what point is of course hard to say——

Q. Can you give the jury the extent as to normal, or subnormal, or as to what proportion of normality that he would have to come to?

A. I can't.

Q. But there will have to be an improvement in the condition of the leg, the condition of the back, and the condition of the nervous system, before there will be any improvement in his sexual function?

A. Yes.

301 Q. And the extent of the improvement you are not able to state?

A. No.

Redirect examination.

By Mr. JOHNSON:

Q. Are you practicing alone or in partnership with anybody else?
A. I have a partner.
Q. Counsel has gone into the matter of recurrence of the bunches or the condition in the stump of this leg. What is your opinion as to the probability or improbability of a recurrence here if the two bunches that are now there be operated upon?
A. The probabilities are, in my opinion, that they will not recur.

Mr. JOHNSON: Is there any question about any of our exhibits here not being in evidence, one to five?
Mr. DAVIS: I don't know as there is any, I presume you have.

Defendant rests.

H. W. OTOS, the plaintiff, was recalled in his own behalf.

Direct examination.

By Mr. DAVIS:

Q. You were in the employ of the company for several years, I believe, as a switchman?
A. Yes, sir.
Q. I will ask you if you know and are conversant with the
302 general custom of making uncouplings in the yards at Willmar, and what had been the custom for several months previous thereto, when the pin-lifter was missing?
A. Yes, sir.

Mr. JANES: Objected to as no foundation laid and calling for an answer which would be incompetent, for the reason that it is in violation of the admitted rules of the company, as appears by the evidence, and is not rebuttal.
COURT: Overruled. Exception.

Q. Your answer is, you know what that custom has been?
A. Yes, sir, I knew.

Mr. JANES: And on the ground this witness cannot establish a custom contrary to the rules of his employment.
COURT: Same ruling. Exception.

Q. You may state what that custom has been.

Mr. JANES: Same objection, on the same grounds as last above stated.
COURT: Same ruling.

Q. State what that custom has been.
A. Why, we stepped in between the cars and pulled the pin.
Q. I will ask you if the yardmaster, Paul Long, has been present at different times when this has been done?

Mr. JANES: Objected to as leading, and upon all the grounds last above stated, and not proper rebuttal.

Mr. DAVIS: And all the rest of the grounds in the books, I presume?

COURT: Same ruling.

Mr. JOHNSON: Exception.

303 Q. You may state whether or not Paul Long, the yardmaster, has been present?

A. Yes, he has seen me step in between.

Both parties.—Testimony closed.

Two bailiffs were sworn to take charge of the jury during the recess, by order of the court.

COURT: Jurors, you are required to go with the officers and remain below, for the reason that I want to listen to some discussion and argument on the part of counsel, that it might not be proper for you to hear. It would be of no advantage to you whatever, and during the recess of course you should not speculate on the case or make any guess as to what is going on. Mr. Bailiffs, you will see that they are furnished their dinner and are back here at 2:30 this afternoon.

Whereupon the jury withdrew from the court-room.

Mr. COUNTRYMAN: I desire to make a motion, if the court please: At the close of all the evidence, the defendant moves the court to direct a verdict in favor of the defendant, upon the following grounds:

That upon all the evidence and the law applicable thereto, the plaintiff is not entitled to recover in this action.

That the evidence wholly fails to establish any negligence or ground or liability on the part of this defendant to the plaintiff.

That the evidence fails to establish any breach of duty owing by the defendant to this plaintiff.

304 That the evidence conclusively establishes the contributory negligence of the plaintiff, which directly contributed to produce the injuries of which he complains.

That it conclusively appears from the evidence that at the time of the accident plaintiff was not engaged or engaging in interstate commerce, and that the defendant was not engaged or engaging in interstate commerce, with respect to the work in which plaintiff was engaged.

And that the car in question, with the defective coupling apparatus was not then engaged or moving in interstate commerce, and that for that reason the federal laws relating to liability of employers to their employees while engaged in interstate commerce, do not apply to this case.

Nor do the federal laws, commonly referred to as, The Safety Appliance Act, apply to this case.

On those grounds the defendant asks that the jury be instructed to bring in a verdict for the defendant.

Mr. DAVIS: Does the court care to be heard on that proposition?

COURT: No, I think not. Motion is denied.

Exception by defendant.

Mr. DAVIS: We consent that defendant's request number 9 be given; formerly numbered 10.

Recess until 2:30 p. m.

Mr. Lende argued the case to the jury on behalf of the defendant, and the following took place during the course of his argument:

Mr. DAVIS: Plaintiff objects to the reading of Exhibit 4, or any rule of the Company, on the ground that the issues as now
305 to be given to the jury do not allow the defense of contributory negligence, and hence the only purpose of reading the rule he is seeking to, is to establish that defense.

Mr. LENDE: May it please the court, it is not. I am not going to argue contributory negligence.

Mr. DAVIS: Then I will object to it as immaterial, reading of that rule, because it cannot be material in this case.

COURT: Objection sustained.

Exception by defendant.

Mr. LENDE: I am going to argue, if the court please, the question of proximate cause as to this injury.

Mr. DAVIS: From a rule?

Mr. LENDE: From all the evidence in this case.

Mr. DAVIS: Then do I understand that it is conceded that you are not going to argue contributory negligence?

Mr. LENDE: If I get to that point and if you feel that there is anything you don't like, you are at liberty to take exception. I am not going to tell you what I am going to do.

Mr. Lende again commenced to read the rule referred to.

Mr. DAVIS: Mr. Reporter, will you please take down the rule as he reads it?

Mr. COUNTRYMAN: I object to that, it is all in evidence.

COURT: As I understand it, the purpose for which the rule was offered was to show contributory negligence, and that is not an issue in the case.

Mr. LENDE: That isn't an issue, but I propose to show the proximate cause of this injury.

306 COURT: Objection sustained to the reading of the rules proposed for that purpose.

Mr. LENDE: And as to the post-card exhibit?

COURT: Yes.

Mr. LENDE: Exception by defendant.

Mr. DAVIS: I object to counsel arguing from the repair-track card, on the ground that it is immaterial whether the repair-track card was upon the car or not, it only goes to the question of contributory negligence.

Mr. LENDE: Contributory negligence will not be argued at all; it is for the purpose of showing the proximate cause of this injury, if Your Honor please. And not only that, but I want to drive home to this plaintiff a knowledge of this defective car.

Mr. DAVIS: Why, that is admitted; he has admitted it himself that he knew this pin-lifter was gone before he stepped in, Your Honor, but that only goes, under the law, to contributory negligence.

COURT: Counsel will proceed, and I will suggest that perhaps it wouldn't be proper to argue the entire state of the case on this evi-

dence that might have some relevancy to assumption of risk, on the theory, or under the theory, of proximate cause.

Mr. LENDE: As long as plaintiff admits his knowledge of the defective condition of this car,—with that admission I shall proceed, and take exception to the remarks of counsel and the ruling of the court.

Mr. Davis argued the plaintiff's case to the jury, and the following proceedings took place during his agrument:

307 Mr. DAVIS: That law was passed, gentlemen of the jury, in 1893, and as I recollect the history of that fight in the national halls of Congress to put upon the books that kind of a law, the very companies, the very railroads for whom my friend to-day argues, used all their efforts to see that it didn't pass Congress and didn't become a law.

Mr. COUNTRYMAN: I desire to have an exception to that remark.

Mr. DAVIS: My entire speech is being taken down.

Mr. COUNTRYMAN: I desire to have an exception to that statement with regard to what the Great Northern probably did or did not do when this Act of Congress was being passed.

COURT: Very well, it is taken.

Mr. DAVIS: Why Mr. Lende was arguing the question of proximate cause, and the court will charge you upon proximate cause something like this, I apprehend:

Mr. COUNTRYMAN: Just a moment, I object to his reading to the jury what the court will charge in advance of information from the court as to whether that charge is to be given or not.

Mr. DAVIS: I am simply reading from a paper of my own.

COURT: I would say, counsel, that I don't think those definitions of proximate cause would be of very much use to the jury, but you can give them if you wish.

Mr. COUNTRYMAN: I would like to make a personal explanation. Counsel has referred to me as general counsel, but I am a long ways from that, I am general attorney.

308 Mr. DAVIS: Gentlemen of the jury, in closing let me say this: It has been a pleasure for me to fight for that boy. He sent for me and asked me if I would fight for him——

Mr. COUNTRYMAN: If the court please, I object to that.

(No ruling.)

Mr. DAVIS: And I took him by the hand and said I would.

Mr. COUNTRYMAN: I desire to take an exception to the closing remark of counsel, that if the jury would give too much it could be corrected, but if they gave too little it could not be corrected.

Charge.

GENTLEMEN OF THE JURY:

It has happened during the progress of this trial, as it frequently occurs in the trial of other cases, that what appeared to be an extremely complicated situation has become simplified as the trial progressed. Some of the issues that were made by the pleadings at the outset have been eliminated from the case, and are laid aside and

withdrawn from your consideration, so that in this case there are but a few, simple issues for you to try and determine.

Considerable evidence was offered which probably should have no bearing, and will have no bearing, in the determination of those issues, but if there was any of it which in your judgment has a bearing or throws any light on the issues that are to be sub-
309 mitted to you, or if evidence in the case offered during the progress of the trial has some indirect effect towards enabling you to decide the issues that are to be submitted to you, you may consider it. But before passing from that point I will say to you, gentlemen of the jury, that in deciding these few simple questions of fact that are for your consideration, you should consider only such evidence as will have a proper bearing and relation to those issues.

It is unnecessary perhaps for me to explain how this matter arose and what the relation- of the parties were. I merely suggest that on September 11, 1912, the plaintiff here, H. W. Otos, was a switch foreman in the employ of the defendant, the Great Northern Railway Company, and as such switch-foreman his duties required him to be in the yards, the railroad yards of the company, at Willmar in this state. It appears that at that time and place he met with an accident, and it is claimed in the complaint that the proximate cause of that accident was the failure of the defendant to equip and maintain its cars with automatic coupling.

When the plaintiff started in in this case the claim was made that his injury was due to two different causes, one, the failure of the company to equip and maintain the car in question with a properly working and operating automatic coupler, and the other was the failure of the company to maintain its rail and guard-rail in proper condition. Now, gentlemen of the jury, there is no claim in the case now made and as now presented no claim made in behalf
310 of the plaintiff, by reason of the imperfect or improper condition or construction of the rail, or guard-rail that was referred to at the earlier stages of the trial of this case.

It appears from the evidence and the stipulation of counsel that the car in question previous to this time, and after this date, had been used for the purpose of carrying commerce destined from one state to another. It appears by the testimony in the case and also by the concessions and statements of counsel that the railroad-track and line upon which plaintiff sustained the injury in question, was used indiscriminately for what is called interstate commerce and intra-state traffic,—that is, traffic between two or more states and traffic confined within the limits of the state of Minnesota. It appears without question that on the day referred to the plaintiff while in the yards of the defendant at Willmar went between the car in question, that is claimed had this imperfect automatic coupler, and another, for the purpose of uncoupling the two cars in question, and it appears without any doubt that on that occasion he received severe personal injuries, to recover damages for which this action is brought.

Now, gentlemen of the jury, in bringing this action the plaintiff relies upon the force and effect of certain congressional acts passed

by the Congress of this country, the gist and substance of which as may be applied in this case, is as follows:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not
311 equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

That is the substance of the act that relates to this case, and that was afterwards amended so that it was provided that this requirement of the law should be applied to all *cases* used on any railroad engaged in interstate commerce. It is not difficult for the jury from a mere reading of that act to determine what is called for by its requirements. It requires all railroad companies engaged in interstate commerce, or interstate traffic, to equip its cars with the kind of coupler that I have referred to and that the Act mentions. You will notice that it describes the couplers as follows: "Such couplers as would couple automatically by impact," which, you understand, means the coupling so as to unite the cars together merely by the coming together of the cars, by their striking or bumping together. And the law further provides that they should be so equipped, and when so equipped that they could be uncoupled without the necessity of men going between the ends of the cars. That is the law, gentlemen of the jury, that is applicable here, that is the law upon which the plaintiff relies for recovery in this action. He claims that because of its violation he is entitled to recover, and I will direct your attention to that later in the charge.

It is conceded in the case, gentlemen of the jury, and the evidence and stipulation indicate, that on the car referred to there was placed an automatic coupler. The court is justified in instructing you that it appears from the testimony and concessions made by the
312 parties in this case that at one time and prior to the accident, the car in question, which is complained of, had the equipment required by the federal act. But it further appears that the so-called lifting rod,—the rod intended to extend outside of the end and out to the side of the car, with a crank or end upon it which might be taken hold of and by the raising or lowering of which the coupling-pin might be removed,—was missing; it is conceded here that that part of the automatic coupling was gone. It follows, and the concession goes to the extent also of conceding the fact, that the coupling was not in operating or working order, so that the car in question with this defective coupling, could not be uncoupled from a car to which it was coupled, at that end, without going between the cars to some extent at least,—that is, without the man who desired to uncouple them going from that side of the car out to the end on which the lifting rod extended, or would have extended if it was there and was properly adjusted.

Now, gentlemen of the jury, it appears that the plaintiff was an employee of the defendant at the time he was injured. I previously called your attention to the fact that his duties required him to be in the yards performing certain work with respect to the switching

and placing of cars in the yards, and one of the first questions for you to consider in this case is this: Was plaintiff as the employee of the defendant acting within the scope of his employment and in the discharge of his duties in going between the cars to uncouple them? If he was so acting at the time he received the in-
313 jury, then his case comes within the operation and protection of this law and he is entitled to recover from the defendant in this action if he received the injuries complained of as the proximate result of the defective condition of the coupler.

There is no question or issue to be submitted to you in this case, gentlemen of the jury, with regard to contributory negligence, or with respect to what has been called the assumption of the risk. Although you might believe from the evidence given upon this trial that the plaintiff did not exercise the degree of care which he might have exercised, or which a man of common prudence would have exercised under the circumstances, and although you may believe under the evidence that he willingly and voluntarily took some risk and assumed some risk,—I say that evidence with regard to his conduct indicating if possible the assumption of the risk or contributory negligence should have no weight with you, and you cannot consider it. That should not and could not defeat a recovery if a recovery is proper, nor tend to diminish the amount that plaintiff is entitled to recover, if under the evidence and under the law you determine that he is entitled to recover in this action. So that there is no question of the contributory negligence of the plaintiff that you will have to consider, or should consider in this action, or can properly take into consideration in determining the issues that are submitted to you.

Gentlemen of the jury, if you find that the plaintiff in the discharge of his duties went between the cars for the purpose of uncoupling them, and that the injuries he received were due
314 directly to the absence and imperfect working condition of the coupler in question, then the defendant would be liable to plaintiff for damages in this action. Neither yourself nor the court have anything to say about the wisdom or want of wisdom of the law that I have read to you. This is a Federal Act, under which this action has been commenced and upon which plaintiff relies in this case. As stated before, the duty of the company, engaged in interstate commerce and using its tracks at Willmar indiscriminately for its intra and interstate commerce, in coupling its cars with automatic couplers is an absolute one, unconditional; and it isn't only its duty to equip them and put those couplers on, but the company, and all such companies as I have referred to, have the continuing duty and obligation resting upon them of keeping these equipping appliances in workable, operating condition and in a state of repair, so that men having occasion and whose duties may require them to uncouple the cars, will not have to go between the cars for the purpose of performing that act.

Another issue in the case for you to determine, and an important issue, is whether the plaintiff was injured as the proximate result of the condition of the coupling appliances. The proximate result—

I will not dwell upon that, I will content myself with reading the definition of proximate cause. Counsel read it to you; it is an approved definition and is as follows:

"The proximate cause of an injury is the primary moving cause without which it would not have been inflicted," (that is, gentlemen of the jury, the injury would not have been inflicted),
315 "but which, in the natural and probable sequence of events, and without the intervention of any new or independent cause produces the injury."

The latter part of the definition I will also read, but it is somewhat difficult for you to understand. I think the earlier part is sufficiently clear, or is at least as clear as can be made. My impression is that the latter part aids but very little to the understanding of proximate cause:

"The intervening cause that will insulate the original wrongful act or omission from the injury and relieve of liability for it must be an independent, intervening cause which interrupts the natural sequence of events, prevents the ordinary and probable result of the original act or omission, and produces a different result which could not have been reasonably anticipated."

Now, gentlemen of the jury, unless the defective condition, or absence of parts from the coupler in question, was the proximate cause of the plaintiff's injury, the plaintiff is not entitled to recover, no matter how severely he might be injured, no matter whether other conditions were not in perfect or proper state of repair. And you are instructed, gentlemen of the jury, before passing from that point, as follows: The jury are instructed that there is no evidence in this case sufficient to justify them in finding that the guard-rail or blocking was in a negligent, defective or improper condition. The effect of that instruction was indicated in the earlier part of the charge. You are further instructed, gentlemen of the jury, that if you beli-ve from the evidence in this case that the proximate
316 cause of plaintiff's injury was tripping or falling over the guard-rail or that the defective coupling apparatus was not the proximate cause of his injury, and that there was no defect in the guard-rail, then your verdict must be for the defendant.

Now, then, gentlemen of the jury, if you find under the evidence and under the instructions given you up to this time that plaintiff is entitled to recover, it will then become your duty to assess and determine the amount of damages which he should be allowed. In considering that feature of the case you have a right to take into consideration all the testimony that goes to indicate the character and nature, the extent and probable result, of the injury that he sustained on the 11th of September, 1912. Counsel on both sides have argued that proposition with a great deal of force and earnestness, and you are instructed that in determining that issue you should not forget that there are two parties to this action, the rights of both of whom you should regard and consider. The plaintiff, if entitled to recover under the evidence and the law as I have given you, is entitled to recover a fair and reasonable compensation for all the injuries that he sustained upon this occasion, and as I said before

and as counsel have indicated, there is really no satisfactory schedule or measure of damages in actions of this kind. The only measure of damages that the jury may take and regard is, first: By considering the nature of the injuries, their character, their consequences,
317 their results, and then fixing such damages as in the judgment of the jury under the evidence and under the law, will fairly and reasonably compensate the plaintiff.

It is not permissible or proper for the jury to allow anything less than what would be fair and reasonable, neither would it be proper or right to go beyond what is reasonable and fair. You should fix, gentlemen of the jury, what you think, under the evidence and under the law, would be fair compensation, without regard to whether this court or any other court could or would hereafter adjust the matter. Because, gentlemen of the jury, it is your province and duty in the first instance,—right here upon this trial, if you find that the plaintiff is entitled to recover, to fix the amount of his recovery at what you consider reasonable in the light of the evidence given in your presence.

Now, then, after having gone over that point sufficiently, I presume, to have impressed it upon you, I direct your attention to the elements of damages that the plaintiff relies upon for recovery here, and that you should take into consideration. In the first place, gentlemen of the jury, you have a right to take into consideration the fact that the plaintiff lost a member of his body,—lost his left leg. The medical experts failed to agree on many questions, but there is no disputing the question that plaintiff lost his left leg and the use of it for all time. You should consider what would be fair compensation for that loss, and in connection with that you have also a right to take into consideration the fact, if it be a fact,—I presume there is no doubt about that,—that by the loss of that limb
318 and member his earning capacity has been lessened and impaired,—decreased. That is an element of damage that you have a right to take into consideration.

You also have a right to consider the pain and suffering in body and mind that the plaintiff underwent in the past and up to the present time; and you have also a right, gentlemen of the jury, to take into consideration any other bodily injuries to which I have not up to this time especially directed your attention.

It is claimed that as a consequence of the injury inflicted and growing out of a part of the injury that he received on the 11th of September, 1912, he lost his sexual power. Now, gentlemen of the jury, you may consider that question in the light of the evidence given here. You may take into consideration the testimony of the experts and others on that point,—the plaintiff, and any other witnesses whose testimony related to that branch of the case. If you find that that is true,—and there seems to be no doubt that he has lost that power up to the present time, that is an element that you might consider in assessing his damages. As to whether or not that condition will be permanent or whether after the lapse of time the power will be restored, is a question for you to determine upon the evidence, gentlemen of the jury.

What I have said with respect to the alleged loss of sexual power also relates to the soreness and impaired condition of the back, and impaired nervous condition of the plaintiff generally, as it is alleged.

In this case, gentlemen of the jury, there are some injuries that are clearly permanent and you cannot speculate on them.

319 There is no doubt that the loss of the left leg is a permanent injury; that remains undisputed. There is no doubt, either, on the proposition that certain other injuries or losses or pains,—referring particularly to the loss of sexual power, the pains in the stump of the leg that was imputed also to the pain in the back and the nervous condition—I say that those, apparently without dispute, have existed from the time that the injury was inflicted and up until the present time. But that is for you to determine under the evidence, gentlemen of the jury; you may consider whether these conditions, outside of the loss of the leg, are to be permanent or whether they will be to some extent or wholly restored in the future.

Now, with respect to allowing damages for permanent injuries, you are instructed, as counsel suggested,—and this refers to the nervous condition, the condition of the back, and the loss of sexual power, and every condition except the loss of the leg itself,—you are instructed that plaintiff is not entitled to recover for permanent injuries unless there is reasonable certainty that the injuries will be permanent.

Gentlemen of the jury, I have given you the law as I understand it, and the law requires you to accept the law as given you by the court as the law applicable to the case, and that is what it is given to you in the charge for. But you are the sole and exclusive judges of the credit to be given to the witnesses, and the weight that should be given to the testimony of the different witnesses who have testified here upon this trial.

320 You are not required, as jurors and as sensible men charged with the responsibility that you are as jurors, to accept passively the testimony of any witness who has testified on the stand, merely because such testimony or evidence was given under the sanction of an oath. You should weigh it carefully with a view to determine what the facts are, and with a view towards being aided by the evidence in the determination of the issues of fact that are submitted to you in this case.

Gentlemen, I give you the case in charge, and after you retire I will send out to the jury-room proper forms of verdict which you will use, as you determine the issues. If you find for the defendant, your verdict will merely be that "we the jury in the above entitled action, find a verdict in favor of the defendant." If you find for the plaintiff, it will be your duty as I stated before, to assess the amount of damages which he is entitled to recover and insert that amount in the form of verdict that I will send out to you, and whichever form you use should be signed by your foreman.

Mr. COUNTRYMAN: The defendant excepts and desires the benefit of a separate exception to each of the refusals of the court to give the instructions,—I think they are numbered from one to seven, as requested by the defendant.

And also excepts to the giving by the court of these portions of the requested instructions presented by the plaintiff which were given in the course of the charge, or the substance thereof.

I desire the benefit of an exception to all those portions of the court's charge in which it was held that the Federal Safety Appliance Act was applicable to this case.

321 And an exception to that portion of the instructions in which the court stated in substance that there could be a recovery notwithstanding the plaintiff did not exercise due care, and that the jury should not consider the evidence tending to show that he did not exercise due care, or that he knowingly took risks, that all those matters weren't defenses an- could not be considered by the jury.

And an exception to the instruction of the court that if they found that plaintiff in the discharge of his duty went between the cars while moving, he might be entitled to recover.

And in that connection except to the failure of the court to instruct the jury that if they believed from the evidence that at the time plaintiff went between the moving cars, he was violating the rules and orders of his employer, then they could find that he was not engaged in the discharge of his duty when he went between the cars.

And defendant desires an exception to the failure of the court to charge the jury upon the subject of proximate cause so as to include the position, evidence and claims of the defendant as to the significance of the plaintiff's own conduct at the time as a bearing upon the question of proximate cause.

By the COURT:

There is just this that I will say to you, gentlemen:—If there is any doubt remaining in your minds or in the minds of the parties to this case:—I will say to you that if the injury that the plaintiff received at the time and place referred to upon this trial and in the pleadings, is due to any other fact, circumstance or cause

322 than to the absence and imperfect working condition of the coupler in question, the plaintiff would not be entitled to recover.

Mr. DAVIS: To that, exception by plaintiff.

Also an exception to the refusal of the court to grant our requested instructions.

Mr. COUNTRYMAN: The defendant excepts to the instruction of the court by which the jury are permitted to find that there was a violation of the Federal Safety Appliance Act even though the car in question was equipped with automatic coupling apparatus, and upon the evidence showing that the lifting-pin had been broken or detached in the course of the operation of the train.

The jury retired for deliberation at 6:10 p. m.

Sixty days' stays of all proceedings ordered by consent.

Mr. COUNTRYMAN: The defendant excepts to the refusal of the court to submit to the jury Exhibits 2, 3, 4 and 5, and excepts to

the refusal of the court to let the jury take those with them to the jury-room.

At 11:05 p. m., January 28, 1914, the jury were ordered by the court to return into court.

By the COURT: Gentlemen, I assume that you have not agreed upon a verdict yet?

JURORS: No, sir.

323 COURT: I requested the bailiff to bring you in at this time to call your attention to this so-called five-sixths jury provision of the statute, which I will read:

"In all civil actions or proceedings in any court of record in this state, after twelve hours' deliberation, the agreement of five-sixths of any jury therein shall be a sufficient and valid verdict.

The deliberation of the jury shall be deemed to be commenced when the officer taking charge of the jury has been sworn and the clerk shall enter such time in his records.

Where the verdict is agreed to by the full membership of the jury, the foreman only shall sign the verdict. When less than the full number agree on the verdict, the same shall be signed by all the jurors who concur therein, and the clerk of said court shall enter on his minutes the number of said jurors concurring in such verdict."

These provisions are so plain that comment could hardly make it plainer. The case according to my recollection, and I think it is correct, was given to you in charge and the officer sworn at ten minutes after six this evening. Now, if within 12 hours after that time, that is, if within 9 or 10 minutes after six tomorrow morning, the twelve of you cannot agree upon a verdict, then a sufficient verdict could be agreed upon and rendered by 10 or 11 members of the jury.

In case you all agree upon a verdict, only the foreman is required to sign; if it is agreed to by 10 of you or 11 and not the full number of jurors, those agreeing to the verdict should sign it on the

324 face of the verdict agreed upon. Those forms that have been sent out to you will answer the purpose in case of a verdict agreed upon by less than the full number of jurors. You understand it, I think, gentlemen.

I have this further to say, that when you have agreed upon a verdict and it is signed as I have explained to you, either by the foreman, or by the 10 or 11 if it is not a unanimous verdict, then seal it up in an envelope, your foreman takes it and you may then separate, but be here at the opening of court tomorrow morning at 9 o'clock.

There is a further matter that it is proper for me to mention to you at this time, and that is this, that I believe I directed or indicated, at least, that this shoe or parts of a shoe which was offered in evidence, would go to your jury-room with you, and also the rails, this exhibit here, but the bailiffs who have you in charge advised me that the rail couldn't be sent in to the jury-room because of the peculiar arrangement of the doors. You may take the shoe now, and if you desire to examine the rail, upon advising the bailiff

in charge, you may come out and inspect it, or an effort might be made to get it into the room, if you care to, but at least you will be given ample opportunity to examine the rail if you desire to,—any of you desire to, let the bailiff know and you may come out and he will withdraw, and afterwards you may retire to the jury-room and further consider the case. You may go out and examine it at any time. He will let you go out any time that you may desire, and examine it, but you should not look at any of the books
325 or papers or attempt to look at any of the books or papers that may be in the room. In fact, Mr. Clerk, you will remove the books and papers so that there will be no occasion for temptation to be placed before the jury in that respect while inspecting the exhibits.

Gentlemen, you may retire.

The shoe, Exhibit F, was at this time delivered to the jury.

Adjournment till 9 a. m., Jan. 29, 1914.

At this time the jury returned into court with a verdict in favor of the plaintiff for the sum of $35,000.

Defendant's Requests for Instruction.

The following were refused by the court, and exception taken to such refusal, as indicated on page ——.

Request 1.

You are instructed that if you believe from the evidence in this case that the car in question, the car with the defective coupling apparatus thereon, had been withdrawn from traffic, as claimed by the defendant, and was being moved onto the side track for the sole purpose of repairs, as claimed by the defendant, then I instruct you that such car was not engaged in interstate commerce at the time the plaintiff was injured, within the meaning of the Federal Safety Appliance Act.

Request refused; exception by defendant.

326 **Request 2.**

The fact that the coupling apparatus on the car in question was defective in and of itself does not justify a verdict for the plaintiff, unless you further find that such car was engaged in interstate commerce at the time of plaintiff's injury.

Request refused; exception by defendant.

Request 3.

It was the legal duty of the defendant to remove the car with the defective coupling apparatus thereon from its train at Willmar for the purpose of repairs, and while solely engaged in removing said car from its train, that is, while moving said car from its main line

track to its repair track, such car would not be engaged in interstate commerce.

Request refused; exception by defendant.

Request 4.

The mere fact that the car in question was loaded with freight in the course of transportation from the state of South Dakota to the State of Minnesota, would not justify you in finding that such car was engaged in interstate commerce at the time the plaintiff was injured.

Request refused; exception by defendant.

Request 5.

If, at the time the plaintiff was injured, he stepped between moving cars for the purpose of uncoupling said cars, he knowing
327 that the lifting lever was missing on one of said cars, and there was a safer way to make such uncoupling, which this plaintiff knew, such fact would justify you in finding that the plaintiff was guilty of contributory negligence. The law requires him to take reasonable precaution to avoid injury.

Request refused; exception by defendant.

Request 6.

If you find that the defendant, at the time the plaintiff was injured, was not engaged in interstate commerce, and that plaintiff was guilty of contributory negligence, then your verdict must be for the defendant.

Request refused; exception by defendant.

Request 7.

The so-called Federal Safety Appliance Act, that is the Act requiring all cars used in handling or moving interstate traffic to be equipped with automatic couplers while so being moved, does not apply to a car after it has been taken from an interstate train for the sole purpose of being placed upon a repair track for the purpose of repairing a defective coupling apparatus thereon.

Request refused; exception by defendant.

Exhibits.

Plaintiff's Exhibits A, B, C and D are photographs of the cars in question.

Plaintiff's Exhibit E is a drawing of coupling apparatus
328 similar to that on the car 125896, in question.

Plaintiff's Exhibit F *are* the pieces of shoe torn at the time of the accident. These embrace all of plaintiff's exhibits.

Defendant's Exhibits Number from 1 to 5.

Defendant's Exhibit 1 is the model of the guard-rail and portion of main rail.

Defendant's Exhibit 2 is a green pastboard card, about four by eight inches in size, with the words "Repair Track" in large black letters thereon.

Defendant's Exhibit 3 is the switch-list, and below is given the heading of it, and whatever part was referred to in the evidence:

"Rear End.

"Great Northern Railway Company.

"Switch List.

"Train No. or Transfer: Extra 1413, in 9-11, 1912.

Initial.	Number.	Contents.	From.	Seals.
1. (of middle section)	36750	(Grain)	G O	B O
6. (same)	125896	"	"	B O

Le Suer."

Exhibit 3 is in three pieces, with blood spots over the B O in the middle section, and on the third section, and similarly spotted and dirtied on upper piece as well as on back.

Defendant's Exhibit 4 *are* the book and rules referred to in evidence, and read into the record, on pages 104 and 159.

329 Defendant's Exhibit 5 is the private mailing card with special notice as to rules, and return postal for return to Superintendent, notice being read into the record on pages 105 and 106.

STATE OF MINNESOTA,
County of Yellow Medicine:

District Court, Twelfth Judicial District.

H. W. OTOS, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Order Allowing Settled Case.

The foregoing official transcript of proceedings upon the trial, having been by me examined and found conformable to the truth and containing all the evidence, rulings, exceptions and proceedings had upon the trial of said action, same is hereby allowed as and for a settled case herein. Photographs and other exhibits intro-

duced at the trial and referred to in the transcript are hereby made a part of said settled case, the same as if actually incorporated in said transcript.

Morris, Minnesota, May 1st, 1914.

S. A. FLAHERTY,
District Judge.

STATE OF MINNESOTA,
County of Yellow Medicine:

District Court, Twelfth Judicial District.

H. W. OTOS, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Notice of Motion.

To Messrs. Davis & Michel, Attorneys for Plaintiff:

You will please take notice, That on Friday, the 1st day of May, 1914, at the judge's chambers at the Court House in the City of Morris, Stevens County, Minnesota, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, the defendant in this
330 action will apply to the court, the Honorable S. A. Flaherty, Judge, for an order setting aside the verdict herein rendered in favor of the plaintiff, and ordering judgment in favor of this defendant notwithstanding said verdict, which motion will be made upon a settled case and upon the files and records in this action, and which motion will be based on the following ground:

That upon all the evidence and law applicable thereto plaintiff is not entitled to recovery and has not proven the allegations of the complaint and has not established negligence or liability on the part of this defendant.

You will please take notice further, That in case the court should deny the foregoing motion, defendant at the same time and place will thereupon move said court for an order setting aside said verdict and granting a new trial of this case, which motion will be made upon a settled case and upon the files and records herein and upon the following grounds:

I.

That said verdict is not justified by the evidence.

II.

That said verdict is contrary to law.

III.

Errors of law occurring at the trial of said action, which said errors are as follows:

(*a*) The court erred in sustaining plaintiff's objection to the ques-

tion: "Well, there was a bad order track or there was a track designated for a bad order track that day, was there not?"

331 (*b*) The court erred in sustaining plaintiff's objection to the introduction in evidence of defendant's Exhibit 3.

(*c*) The court erred in overruling defendant's objections to questions asked the plaintiff that tended to prove that the custom in the yards at Willmar was a step between the cars for the purpose of pulling the coupling pin when the pin-lifter was missing.

(*d*) The court erred in sustaining plaintiff's objection to the reading of defendant's Exhibits 4 and 5 to the jury during the closing argument of defendant's counsel.

(*e*) The court erred in denying and in wholly failing to give defendant's requests for instructions numbered from 1 to 7 inclusive, which rulings of the court were duly excepted to, as follows:

Request 1.

You are instructed that if you believe from the evidence in this case that the car in question, the car with the defective coupling apparatus thereon, had been withdrawn from traffic, as claimed by the defendant, and was being moved onto the side track for the sole purpose of repairs, as claimed by the defendant, then I instruct you that such car was not engaged in interstate commerce at the time the plaintiff was injured, within the meaning of the Federal Safety Appliance Act.

Request 2.

The fact that the coupling apparatus on the car in question was defective in and of itself does not justify a verdict for the plaintiff, unless you further find that such car was engaged in inter-

332 state commerce at the time of plaintiff's injury.

Request 3.

It was the legal duty of the defendant to remove the car with the defective coupling apparatus thereon from its train at Willmar for the purpose of repairs, and while solely engaged in removing said car from its train, that is, while moving said car from its main line track to its repair track, such car would not be engaged in interstate commerce.

Request 4.

The mere fact that the car in question was loaded with freight in the course of transportation from the state of South Dakota to the state of Minnesota, would not justify you in finding that such car was engaged in interstate commerce at the time the plaintiff was injured.

Request 5.

If, at the time the plaintiff was injured, he stepped between moving cars for the purpose of uncoupling said cars, he knowing that the lifting lever was missing on one of said cars, and there was a safer

way to make such uncoupling, which this plaintiff knew, such fact would justify you in finding that the plaintiff was guilty of contributory negligence. The law requires him to take reasonable precaution to avoid injury.

Request 6.

If you find that the defendant, at the time the plaintiff was injured, was not engaged in interstate commerce, and that plaintiff was guilty of contributory negligence, then your verdict must be for the defendant.

333 Request 7.

The so-called Federal Safety Appliance Act, that is the Act requiring all cars used in hauling or moving interstate traffic to be equipped with automatic couplers while so being moved, does not apply to a car after it has been taken from an interstate train for the sole purpose of being placed upon a repair track for the purpose of repairing a defective coupling apparatus thereon.

(*f*) The court erred in instructing the jury that the provisions of the so-called Federal Safety Appliance Act were applicable to the facts of this case.

(*g*) The court erred in instructing the jury, as follows:

"That is the law, gentlemen of the jury (referring to the Safety Appliance Act) that is applicable here, that is the law upon which the plaintiff relies for recovery in this action. He claims that because of its violation he is entitled to recover, and I will direct your attention to that later in the charge."

(*h*) The court erred in instructing the jury as follows:

"Was plaintiff as the employe of the defendant acting within the scope of his employment and in the discharge of his duties in going between the cars to uncouple them? If he was so acting at the time he received the injury, then his case comes within the operation and protection of this law and he is entitled to recover from the defendant in this action if he received the injuries complained of as the proximate result of the defective condition of the coupler."

(*i*) The court erred in instructing the jury as follows:

334 "There is no question or issue to be submitted to you in this case, gentlemen of the jury, with regard to contributory negligence, or with respect to what has been called the assumption of the risk. Although you might believe from the evidence given upon this trial that the plaintiff did not exercise the degree of care which he might have exercised or which a man of common prudence would have exercised under the circumstances, and although you may believe under the evidence that he willingly and voluntarily took some risk and assumed some risk—I say that evidence with regard to his conduct indicating if possible the assumption of the risk or contributory negligence should have no weight with you, and you cannot consider it. That should not and could not defeat a recovery if a recovery is proper, nor tend to diminish the amount

that plaintiff is entitled to recover, if under the evidence and under the law you determine that he is entitled to recover in this action. So that there is no question of the contributory negligence of the plaintiff that you will have to consider, or should consider in this action, or can properly take into consideration in determining the issues that are submitted to you."

(*j*) The court erred in instructing the jury as follows:

"Gentlemen of the jury, if you find that the plaintiff in the discharge of his duties went betwe-n the cars for the purpose of uncoupling them, and that the injuries he received were due directly to the absence and imperfect working conditions of the coupler in question, then the defendant would be liable to plaintiff for damages in this action."

(*k*) The court erred in assuming in its instruction that
335 it was established by the evidence in this case that the plaintiff was engaged in interstate commerce at the time he was injured.

(*l*) The court erred in failing to submit to the jury as a question of fact to be determined by it whether or not the plaintiff was engaged in interstate commerce at the time he was injured.

(*m*) The court erred in instructing the jury as follows:

"As stated before, the duty of the company, engaged in interstate commerce and using its tracks at Willmar indiscriminately for its intra and interstate commerce, in coupling its cars with automatic couplers is an absolute one, unconditional; and it isn't only its duty to equip them and put those couplers on, but the Company, and all such companies as I have referred to, have the continuing duty and obligation resting upon them of keeping these equipping appliances in workable, operating condition and in a state of repair, so that men having occasion and whose duties may require them to uncouple the cars, will not have to go between the cars for the purpose of performing that act."

(*n*) The court erred in assuming in its instructions to the jury that under the Federal Safety Appliance Act the plaintiff was entitled to recover in this action where it affirmatively appeared that the plaintiff in violation of the rules of the defendant went between moving cars for the purpose of uncoupling, even though the coupling apparatus thereon was defective.

(*o*) The court erred in failing to charge the jury in substance that the plaintiff was not engaged in the performance of his
336 duties at the time he was injured, if the jury believed from the evidence that at the time plaintiff made the uncoupling he was violating the rules of his employer which he then understood.

(*p*) The court erred in refusing to submit to the jury for its consideration defendant's Exhibits 2, 3, 4 and 5 and in refusing to allow them to be taken to the jury room.

IV.

The verdict awards excessive damages, appearing to have been given by the jury under the influence of passion and prejudice.

You will please take notice, that immediately before the hearing of said motion, the undersigned will apply to Judge Flaherty for an order allowing as a settled case, the proposed case heretofore served upon you.

Yours respectfully,

M. L. COUNTRYMAN AND
A. L. JANES,
Attorneys for Defendant, 203 Great Northern Building, St. Paul, Minnesota.

STATE OF MINNESOTA,
County of Yellow Medicine:

District Court, Twelfth Judicial District.

H. W. OTOS, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Motion Denied.

The above entitled cause came before the court at chambers in Morris, Minnesota, on the first day of May, 1914, upon motion of defendant, made in the alternative, for an order for judgmnet in its favor notwithstanding the verdict herein, or in the event of
337 the denial of said motion, for an order setting aside said verdict and granting defendant a new trial of said action; and said parties having appeared by their respective counsel, and said motions having been argued, heard and submitted, upon due consideration, it is,

Ordered that said motion for an order for judgment notwithstanding the verdict be, and the same is hereby denied.

Ordered further that a new trial of this action be, and the same is hereby granted unless the plaintiff within ten days from notice of the filing of this order, file with the clerk of said court a stipulation in writing consenting that the verdict may and shall be reduced to the sum of thirty thousand dollars. It is further ordered that in case plaintiff shall, within the time aforesaid, file such stipulation, then and thereupon said motion for an order setting aisde the verdict and granting a new trial herein, shall be and is, hereby in all respects denied.

Dated at Morris, Minnesota, July 24, 1914.

S. A. FLAHERTY,
Judge of District Court, Sixteenth Judicial District, Acting for One of the Judges of the Twelfth Judicial District.

Note.

Upon the hearing of the motion above mentioned there was no question whatever argued or suggested except that the damages

awarded by the jury were exces-ive. The briefs submitted
338 and all the authorities cited had reference to that question only. Indeed, under the facts in this case covered and conceded by the stipulations and established by the evidence, and the law as construed and applied by courts whose adjudications are absolutely binding by this court, there could not be any matter open to legitimate argument but the one discussed by counsel. The question as to the amount that plaintiff was entitled to recover was the only real issue there was in this case.

It is my decided conviction that under a fair and intelligent application of the rule of compensatory damages, taken by itself and in connections with the facts in the case, the verdict of the jury herein was not excessive. While the jury may be said to have been guided by that rule, they evidently did not follow it strictly, but must have applied it with some abatement from the principle that the damages recoverable should be fairly and adequately compensatory for all the loss and injury sustained. If, in this action, the jury had closely adhered to the rule which the court laid down in its charge there can be no doubt that a much larger verdict would have been returned. The question then may well be asked, how can a court entertaining this view consistently and properly require that the damages assessed be reduced as a condition of permitting the verdict in favor of plaintiff to stand? This may not be capable of a very lucid or satisfactory explanation in a few words, but it is an instance in which the court is obliged to recognize the fact that theory must to some extent yield to and be controlled by practice and precedent; that to understand the sense in which this
339 or any other rule of law should be taken we must ascertain how it has been dealt with and applied, and how it has been regarded, by the courts of last resort. The truth seems to be that while this rule of damages is universally conceded to be correct, possibly the best that can be devised, it is nevertheless one which all the higher courts have felt the necessity of repressing, limiting and depriving of its full force and effect. This appears to be more especially true in the class of cases to which the one under consideration belongs. The rule, so far as I know, has not been directly or expressly assailed with intent to overthrow it, but the effect of the numerous adjudications of those courts has been to settle a practice and firmly establish precedents, which, with some little latitude, are controlling on trial courts. I need not here speculate as to how this has come about, or dwell upon its history, being content to have merely noted the fact. It has undoubtedly been appreciated that in cases like this there can be no adequate compensation for the injury sustained and the physical and mental anguish endured. It is utterly beyond human power to do anything more or better than to afford a remedy for a meagre and but partial compensation, which however in a loose and conventional way has come to be spoken of as if it were in fact full and adequate compensation.

Upon a trial the jury is instructed as to the rule and proper measure of damages but it can not be advised of the precedents in similar actions. Hence it is that the trial court must occasionally

be convinced, as I am in this case, that while the jury in as-
340 sessing damages acted conservatively and with sound judg-
ment, the verdict may be somewhat too large as viewed in the light of decisions of higher courts in like cases.

The case made on behalf of plaintiff was almost entirely free from doubt on every question of injury. Before the accident he was a young man of more than ordinary intelligence, in robust health, physically strong and active. That he was a man of good fibre and abundant vital force is indicated by the fact that he survived the injury inflicted, the amputation of his leg, and the long train of ills and sufferings that he afterwards endured. While he had been in the employ of the company he had made such progress that he might reasonably look forward to further promotions and a successful career in his line of work.

There was no claim or intimation that at any time plaintiff was faking, or simulating any troubles, pains or injuries that did not exist to the full extent that he represented. That his left leg was amputated so close to the body that there was nothing left to which an artificial limb or other appliance might be attached, spoke for itself and established a permanent injury of so serious a nature that it must be accepted without question or hesitation. I will not dwell upon or assume to detail the evil consequence that resulted and will follow from the severance of that limb from his body, or the extremely unfortunate and unfavorable condition of the place where the amputation was made. It was shown, without dispute, that be-
tween the time of the accident and the time of the trial—
341 about sixteen months—plaintiff was unable to move about with the aid of crutches or with the assistance of friends, or to remain on his feet at all for any length of time; that during all that period he was without sexual power and had suffered excruciating pains. The medical expert witnesses for defendant all rather freely admit this, and with all their command of apt and appropriate language, appeared to wish to have it understood that they could not fully express and convey their opinions of the intense suffering plaintiff endured. I will not enter upon any examination of evidence bearing upon the permanency of plaintiff's loss of sexual power, or the injury to his back and nervous system, but the jury, who were an exceptionally solid, level-headed body of men, had abundant evidence before them to justify the conclusion that such injuries were permanent. The record is too clear on that question to permit of a different opinion.

S. A. F.

STATE OF MINNESOTA:
County of Yellow Medicine:

District Court, Twelfth Judicial District.

H. W. OTOS, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Notice of Appeal.

To Davis and Michel, attorneys for plaintiff, and Alvin Landru, clerk of the District Court:

You will please take notice that the Great Northern Railway Company, defendant in the above entitled action, appeals to the Supreme Court of the state of Minnesota from the order of this court in this action made and filed on the 24th day of July, 1914,
342 denying defendant's motion for judgment notwithstanding the verdict and for a new trial and from the whole thereof.

M. L. COUNTRYMAN AND
A. L. JANES,
Attorneys for Defendant,
203 *Great Northern Building, St. Paul, Minnesota.*

July 27, 1914.

Bond on appeal is hereby waived and it is hereby stipulated that all proceedings in this action shall be stayed until the determination of this appeal.

DAVIS AND MICHEL,
Attorneys for Plaintiff.
M. L. COUNTRYMAN AND
A. L. JANES,
Attorneys for Defendant.

Due and personal service of the within notice at this 28th day of July, A. D. 1914, is hereby admitted.

DAVIS & MICHEL,
Attorneys for Plaintiff.
ALVIN LANDRU,
Clerk District Court.

Filed July 29, 1914. Alvin Landru, Clerk Dist. Court.

343 STATE OF MINNESOTA,
County of Yellow Medicine, ss:

District Court.

I, Alvin Landru, Clerk of the District Court in and for the County of Yellow Medicine, in the State of Minnesota, do hereby certify

that I have compared the foregoing paper writing with the original Notice of Appeal and waiver of Bond in the action therein entitled, remaining on file and of record in this office, and that the same is a true and correct copy and transcript of said original and of the whole thereof.

Witness my hand and seal of said court, at Granite Falls, in said county, this 29 day of July, A. D. 1914.

[SEAL.] ALVIN LANDRU, *Clerk.*

(Endorsed:) Filed July 30, 1914. I. A. Caswell, Clerk.

344 STATE OF MINNESOTA:

Supreme Court, October Term, 1914.

H. W. OTOS, Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Assignments of Error.

I.

The court erred in denying defendant's motion for judgment in its favor notwithstanding the verdict, upon the following grounds:

(*a*) That upon the evidence and the law applicable thereto plaintiff is not entitled to recover.

(*b*) That the evidence wholly failed to establish any negligence or liability on the part of the defendant; that the evidence conclusively establishes the contributory negligence of plaintiff and that such negligence directly contributed to produce the injuries of plaintiff.

(*c*) That it conclusively appears from the evidence that at the time of the accident plaintiff was not engaged or engaging in interstate commerce and that defendant was not engaged or engaging in interstate commerce with respect to the work which plaintiff was doing at the time he was injured.

(*d*) That it conclusively appears from the evidence that the car on which plaintiff was working at the time he was injured had been removed from interstate commerce and that for this reason the Federal Employers' Liability Act, or the Federal Safety Appliance Act did not apply to the facts of this case.

(*e*) That the proximate cause of plaintiff's injury was
345 not the defective condition of the coupling apparatus upon the car on which he was working, but was the violation of one of the rules of this defendant by this plaintiff.

II.

The court erred in denying defendant's motion for a new trial upon the ground that said verdict is not justified by the evidence.

III.

The court erred in charging the jury as follows:

"Gentlemen of the jury, if you find that the plaintiff in the discharge of his duties went between the cars for the purpose of uncoupling them, and that the injuries he received were due directly to the absence and imperfect working condition of the coupler in question, then the defendant would be liable to plaintiff for damages in this action."

IV.

The court erred in charging the jury as follows:

"As stated before, the duty of the company, engaged in interstate commerce and using its tracks at Willmar indiscriminately for its intra and interstate commerce, in coupling its cars with automatic couplers is an absolute one, unconditional; and it isn't only its duty to equip them and put those couplers on, but the company, and all such companies as I have referred to, have the continuing duty and obligation resting upon them of keeping these equipping appliances in workable, operating condition and in a state of repair, so that men having occasion and whose duties may require them to uncouple the cars, will not have to go between the cars for the purpose of performing that act."

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V.

The court erred in denying and in wholly failing to give to the jury defendant's request for instruction numbered 1 as follows:

"You are instructed that if you believe from the evidence in this case that the car in question, the car with the defective coupling apparatus thereon, had been withdrawn from traffic, as claimed by the defendant, and was being moved onto the side track for the sole purpose of repairs, as claimed by the defendant, then I instruct you that such car was not engaged in interstate commerce at the time the plaintiff was injured, within the meaning of the Federal Safety Appliance Act."

VI.

The court erred in denying and in wholly failing to give to the jury defendant's request for instruction, numbered 2, as follows:

"The fact that the coupling apparatus on the car in question was defective in and of itself does not justify a verdict for the plaintiff, unless you further find that such car was engaged in interstate commerce at the time of plaintiff's injury."

VII.

The court erred in denying and in wholly failing to give to the jury defendant's request for instruction, numbered 3, as follows:

"It was the legal duty of the defendant to remove the car with the defective coupling apparatus thereon from its train at Willmar for the purpose of repairs, and while solely engaged in removing said

car from its train, that is, while moving said car from its
347 main line track to its repair tracks, such car would not be engaged in interstate commerce."

VIII.

The court erred in denying and in wholly failing to give to the jury defendant's request for instruction numbered 4, as follows:

"The mere fact that the car in question was loaded with freight in the course of transportation from the state of South Dakota to the state of Minnesota, would not justify you in finding that such car was engaged in interstate commerce at the time plaintiff was injured."

IX.

The court erred in denying and in wholly failing to give to the jury defendant's request for instruction, numbered 5, as follows:

"If, at the time the plaintiff was injured, he stepped between moving cars for the purpose of uncoupling said cars, he knowing that the lifting lever was missing on one of said cars, and there was a safer way to make such uncoupling, which this plaintiff knew, such fact would justify you in finding that the plaintiff was guilty of contributory negligence. The law requires him to take reasonable precaution to avoid injury."

X.

The court erred in denying and in wholly failing to give to the jury defendant's request for instruction, numbered 6, as follows:

"If you find that the defendant, at the time the plaintiff was injured, was not engaged in interstate commerce, and that plaintiff was guilty of contributory negligence, then your verdict must be for the defendant."

348 XI.

The court erred in denying and in wholly failing to give to the jury defendant's request for instruction, numbered 7, as follows:

"The so-called Federal Safety Appliance Act, that is the Act requiring all cars used in hauling or moving interstate traffic to be equipped with automatic couplers while so being moved, does not apply to a car after it has been taken from an interstate train for the sole purpose of being placed upon a repair track for the purpose of repairing a defective coupling apparatus thereon."

XII.

The court erred in instructing the jury as follows:

"That is the law, gentlemen of the jury (referring to the Safety Appliance Act) that is applicable here, that is the law upon which the plaintiff relies for recovery in this action. He claims that because of its violation he is entitled to recover, and I will direct your attention to that later in the charge."

XIII.

The court erred in instructing the jury as follows:

"Was plaintiff, as the employe of the defendant, acting within the scope of his employment and in the discharge of his duties in going between the cars to uncouple them? If he was so acting at the time he received the injury, then his case comes within the operation and protection of this law and he is entitled to recover from the defendant in this action if he received the injuries complained of as the proximate result of the defective condition of the coupler."

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XIV.

The court erred in instructing the jury as follows:

"There is no question or issue to be submitted to you in this case, gentlemen of the jury, with regard to contributory negligence, or with respect to what has been called the assumption of the risk. Although you might believe from the evidence given upon this trial that the plaintiff did not exercise the degree of care which he might have exercised or which a man of common prudence would have exercised under the circumstances, and although you may believe under the evidence that he willingly and voluntarily took some risk and assumed some risk—I say that evidence with regard to his conduct indicating if possible the assumption of the risk or contributory negligence should have no weight with you, and you cannot consider it. That should not and could not defeat a recovery if a recovery is proper, nor tend to diminish the amount that plaintiff is entitled to recover in this action. So that there is no question of the contributory negligence of the plaintiff that you will have to consider, or should consider in this action, or can properly take into consideration in determining the issues that are submitted to you."

XV.

The court erred in failing to charge the jury in substance that if plaintiff was injured while between moving cars for the purpose of uncoupling such cars, even though the coupling apparatus thereon was defective and such action on the part of plaintiff was in violation of the rules of plaintiff, then plaintiff at such time was not in the performance of his duty and if such action on the part of
350 plaintiff was the proximate cause of plaintiff's injuries then he could not recover in this action.

XVI.

The court erred in failing to submit to the jury as a question of fact to be determined by it whether or not plaintiff was engaged in interstate commerce at the time he was injured.

XVII.

The court erred in denying said motion for a new trial upon the ground of excessive damages, appearing to have been given under

the influence of passion and prejudice, and not justified by the evidence.

M. L. COUNTRYMAN,
A. L. JANES,
Attorneys for Appellant.

351 18955.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 182.

H. W. OTOS, Respondent,
v.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Syllabus.

A car in process of transportation from one state to another is in transit and is being used in interstate commerce while being switched at an intermediate yard with other interstate cars, although there may be a purpose to switch the defective car to a repair track for repair of a defective coupler before it leaves the yard. The Federal Safety Appliance Act and the Employers' Liability Act apply to such a car.

2. The act of a switchman in stepping between moving cars to make an uncoupling because of a defective coupler is not the sole proximate cause of an injury received by him while so doing. The violation of the statute is a contributing cause of the injury.

3. The damages as reduced by the trial court are not excessive. Defendant was not entitled to a reduction of the amount of plaintiff's damages because of a prospect that a surgical operation might relieve part of his injury.

Order affirmed.

352 18955.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 182.

H. W. OTOS, Respondent,
v.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Opinion.

Plaintiff was a switch foreman in defendant's yards at Willmar. On September 11, 1912, a train came into Willmar from the west

It contained, among others, a loaded car from Willow Lake, South Dakota, consigned to Minneapolis. This car was coupled with automatic couplers to a car consigned to Duluth, by way of Superior, Wisconsin. The pin lifter on the Minneapolis car was out of order. At Willmar the Duluth car was to be transferred to another train. There is some evidence that the Minneapolis car was to be switched to the repair track, before it proceeded further, for the purpose of repairing the coupler. There is no evidence that it was ever so transferred. The car was carried to Minneapolis on the following day. Plaintiff and his crew were engaged in cutting up this train and switching the cars to be removed from it to their proper destination. At the time of the accident he had three cars attached to a switch engine; the Duluth car was in the rear and the Minneapolis car in the middle. Plaintiff was about to cut off the Duluth car in order to switch it to the Duluth track. He stood on the side
353 from which the pin lifter was missing. He could not make the uncoupling from that side without going in between the cars. This he did, and in doing so he was run over and sustained severe injuries.

It is conceded that defendant's road at Willmar is a highway of interstate commerce and that the traffic in which this car was engaged when in transit was interstate traffic, and that if it was in transit at this time, then, under the Federal Safety Appliance Acts and Employers' Liability Act, defendant is liable for any injury caused by the defective coupler, and neither contributory negligence nor assumption of risk constitutes any defense. The contention of defendant is that "the condition of the car was such that it had to go to a repair track for repair;" that "it was necessary that the through movement of the car be interrupted at Willmar for the purpose of repairs," and that therefore "the defective car had been withdrawn from commerce" and was "not in the course of transit."

We are of the opinion that at the time of plaintiff's injury this defective car was in transit and was being used in interstate commerce. A car in process of transportation from one state to another is usually in transit and engaged in commerce from the time it is started upon its passage until the delivery of its cargo at the place of destination. United States v. Colorado & N. W. R. Co., 157 Fed. 321. It is not taken out of commerce because in need of repair, nor because of a purpose to repair it, nor because of a design to set it upon a repair track in due course for that purpose. We need not consider what the situation might have been if this car had been set at rest on the repair track. This had not been done. At the time of
354 the accident it was still part of an interstate train. Its cargo had not reached its destination and was not ready for delivery to the consignee. It was attached to and was being moved with another interstate car, from which it was in due course being uncoupled. Clearly the defective car was in transit and was being used in interstate commerce.

The Federal decisions leave no doubt upon this point.

In Belk v. St. Louis & San Francisco R. R. Co., 220 U. S. 580, a car loaded and being used in moving interstate traffic was found

with a defective coupler. The car was marked "in bad order," and a repair piece sent for, but the company kept on moving it about in connection with other cars, and finally ordered the injured employe to couple it to another car. This he tried to do and was injured. It was held that the car in question was being used in interstate traffic.

In C. N. & St. P. Ry. Co. v. United States, 165 Fed. 423, it was said that, if a car is one of the connecting links between the engine and the caboose and a constituent part of a train moving on an interstate mission, the car is engaged in interstate commerce. See also Erie R. Co. v. Russell, 183 Fed. 722; Southern Ry. Co. v. Snyder, 205 Fed. 668.

2. Defendant contends that the proximate cause of plaintiff's injury was not the defective condition of the coupling, but his violation of a rule of the employer forbidding employes going between moving cars. It appears that there was such a rule. There is evidence that in this yard it had, with the knowledge of the yardmaster, been more honored in its breach than in its observance. But, whatever may be said of the propriety of plaintiff's act in going between the cars, it was only one of the concurring causes of plaintiff's
355 injury. The violation of the statute was one cause of his injury. Turritain v. C. St. P. M. & O. Ry. Co., 95 Minn. 408; Sprague v. Wis. Cent. Ry. Co., 104 Minn. 58. This is all that is necessary to create liability. The statute which abolishes contributory negligence "would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence.—It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act." Grand Trunk Ry. Co. v. Lindsay, 233 U. S. 42, 47, quoting 201 Fed. 844.

3. The jury assessed plaintiff's damages at $35,000. The trial court reduced the amount to $30,000. Plaintiff was 26 years old at the time of his injury and was earning from $105 to $115 a month. His left leg was amputated within two inches of the hip joint, so close to the body that the use of an artificial leg is impossible. There was not sufficient skin to cover the stump, and scar tissue was formed. Four different operations have been performed for the purpose of engrafting skin upon the stump. Several more were performed to remove cinders or to open abscesses that had formed. Two nerve tumors have formed upon the stump, caused by the ends of the nerves being imbedded in the scar tissue. These are intensely painful to the slightest touch, and they cause intense spasms of pain on pressure or movement. From some cause, perhaps because of these nerve tumors, plaintiff suffers intense pain in the small of the back so that he can neither sit up or use a crutch. There is evidence that these conditions are permanent, in fact it is conceded that they can only be relieved by further surgical operation.

356 Defendant contends there is a practical way of improving plaintiff's condition. It offered evidence that the nerve tumors may be removed by a surgical operation and that their re-

moval will remove the cause of pain in the stump and in the back, and to all intents and purposes restore plaintiff's general health. Defendant claims it is the duty of plaintiff to submit to such operation, or, if he chooses not to do so, that the injuries which may be remedied by an operation should not be considered in measuring his damages. This suggested operation is described as follows: "Cut down on the stump and resect these diseased nerve endings, pulling them out and cutting off higher up, and then by stitching the end of the cut nerve together, pulling it over, to prevent a recurrence of a similar condition, and sewing the end up so as to leave no raw surface exposed." It is conceded that after such an operation there is liability of recurrence of these nerve tumors, and that in some cases as many as three operations have been required.

We are of the opinion that plaintiff was entitled to an assessment of damages based on the condition he was in at the time of the trial. A person who sustains damage at the hands of another, whether through breach of contract or through tort, is required to take all reasonable measures to reduce his damage, but we cannot carry this doctrine to the extent of holding that this plaintiff, who had already submitted to an amputation which a "great proportion of men * * * do not survive," and a number of lesser operations, is under any obligation to submit to another surgical operation of the character described in pursuit of an uncertain prospect of lessening
357 his injury and his damage. Maroney v. N. & St. L. Ry. Co., 123 Minn. 480, and cases cited.

There is some evidence that plaintiff's injury has caused permanent impotence, due — the interruption of the course of certain nerves. The testimony on this subject is sharply in conflict. Injury of this sort is very easy to feign or exaggerate and very hard to disprove. Temporary loss of sexual power is the usual concomitant of almost every severe injury or illness, and cannot usually be considered as a distinct element of damage. Bucher v. Wis. Cent. Ry. Co., 139 Wis. 597. At the same time, where there is tangible proof that by reason of direct injury to the generative organs or the nerves that prompt their action, and resulting impotence, there is no good reason why this element may not be considered. Where the proof rests upon opinion evidence, it should be closely scrutinized, but it cannot in all cases be rejected entirely. In this case there is evidence of injury to the pudic nerve, and also evidence that every known test indicates present impotence, and there is expert evidence based upon this alleged organic injury that impotence will be permanent. We think the court cannot say as a matter of law that this evidence should have been wholly disregarded. However, it seems to us that this verdict can be sustained without resting largely upon this claim. Aside from this element of damage, the case is in no sense parallel to those involving the mere loss of one leg. In fact many men who have sustained amputation of both legs, as in Sprague v. Wis. Cent. Ry. Co., 104 Minn., 58; Whitehead v. Wis. Cent. Ry. Co., 105 Minn. 13, are in no worse plight than this plaintiff. We are not disposed to further disturb the amount of this verdict.

Order affirmed.

HALLAM, *J.*

358 State of Minnesota Supreme Court. H. W. Otos, Respondent, vs. Great Northern Railway Company, appellant. Opinion and Syllabus. Filed January 29, 1915. I. A. Caswell, Clerk. Hallam, J.

359 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1914.

Wednesday morning, 9:30 o'clock, January 6, A. D. 1915, Court convened pursuant to adjournment.

Reg. No. 18955, Cal. No. 182.

H. W. OTOS, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.
Attest:
[SEAL.] I. A. CASWELL, *Clerk*,

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.
Attest:
[Seal of the Supreme Court, State of Minnesota.]
I. A. CASWELL, *Clerk*,
By —— ——, *Deputy*.

(Endorsed:) Filed Feb. 9, 1915. I. A. Caswell, Clerk.

360 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 182.

H. W. OTOS, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Appeal from District Court, Twelfth Judicial District, County of Yellow Medicine.

This cause having been duly argued and submitted at the General October Term of this court A. D. 1914 upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the Court below, herein appealed from, be and the same hereby is, in all things affirmed and that judgment be entered accordingly.

Entered February 9, A. D. 1915.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

[Seal of the Supreme Court, State of Minnesota.]

Attest:

I. A. CASWELL, *Clerk.*

(Endorsed:) Filed Feb. 9, 1915. I. A. Caswell, Clerk.

361 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 182.

H. W. OTOS, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause February 9 A. D. 1915

It is here and hereby determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court of the Twelfth Judicial District, sitting within and for the County of Yellow Medicine be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of Ninety-two and 30/100 Dollars, ($92.30) costs and disbursements in this cause in this court, and that execution may be issued for the enforcement thereof.

Dated and signed February 9, A. D. 1915.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs $25.00; Printer $55.80; Clerk $11.25; Acknowledgments $.25; Return $—; Postage and Express $—; Filing Mandate —; Total $92.30.

362 STATE OF MINNESOTA:
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul February 9 A. D. 1915.

[SEAL.] I. A. CASWELL, *Clerk.*

State of Minnesota, Supreme Court. Transcript of judgment. Filed February 9, 1915. I. A. Caswell, clerk.

363 No. 18955. State of Minnesota, Supreme Court. H. W. Otos, Respondent, vs. Great Northern Railway Company, Appellant. Judgment Roll. Filed February 9, 1915. I. A. Caswell, Clerk.

364 *Mandate.*

STATE OF MINNESOTA,
Supreme Court, ss:

The State of Minnesota to the Hon. Judge and officers of the District Court of the Twelfth Judicial District, Sitting within and for the County of Yellow Medicine, Greeting:

Whereas, Lately in your Court, in an action therein pending, between H. W. Otos, Plaintiff, and Great Northern Railway Company, Defendant, a certain order was entered therein July 24 1914 from which action of your Court an appeal thereafter was taken to this Court;

And Whereas, The same was duly argued, heard and submitted; and after mature deliberation thereupon had, our Supreme Court did adjudge, determine, decree and order "That the order of the Court below herein appealed from, be, and the same hereby is, in all things affirmed and that judgment be entered accordingly." A copy of the entry of Judgment thereupon in this Court is herewith transmitted and made part of this Remittitur.

Now, therefore, this mandate is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith remanded to your Court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness, the Hon. Calvin L. Brown, Chief Justice of the Supreme

Court aforesaid, and the seal of said Court at St. Paul, this 9th day of February 1915.

[Seal of the Supreme Court, State of Minnesota.]

(Signed) I. A. CASWELL,
Clerk of the Supreme Court,
By —— ——, *Deputy.*

(Endorsed:) Filed Feb. 11, 1915. Alvin Landru, Clerk.

365 STATE OF MINNESOTA,
County of Yellow Medicine:

District Court, Twelfth Judicial District.

H. W. OTOS, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant.

Judgment, Feb. 23rd, 1915.

This cause having been regularly placed upon the calendar of the above named Court for the January A. D. 1914, General Term thereof, came on for trial before the Court and a Jury duly empanelled and sworn to try the same on the 26th day of January A. D. 1914, which said Jury did on the 29th day of January A. D. 1914, duly render a verdict herein said verdict being by the Court reduced Five Thousand Dollars and consented to by Plaintiff,

Now, Pursuant to said Verdict and on motion of Earnest A. Michel on- of the Attorneys for Plaintiff it is hereby adjudged that the Plaintiff recover of the Defendant and each of them the sum of Thirty One Thousand Nine Hundred Right and 50/100 Dollars the amount of said Verdict and interest to date hereof, together with Four Hundred Forty Eight and 85/100 Dollars costs and disbursements as taxed and allowed, amounting in all to the sum of Thirty Two Thousand Three Hundred Fifty Seven and 35/100 Dollars.

By the Court:

ALVIN LANDRU,
Clerk District Court.

(Endorsed:) Judgment Roll. Jury Trial. Filed this 23rd day of February 1915 at 5 o'clock P. M. Alvin Landru, Clerk.

366 STATE OF MINNESOTA,
County of Yellow Medicine, ss:

District Court, Twelfth Judicial District.

I, Alvin Landru Clerk of the District Court in and for Yellow Medicine County, State of Minnesota, do hereby certify that I have

carefully compared the paper writing hereto annexed with the original judgment and find that the same is a true and correct copy of said original and the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court at Granite Falls on this 13th day of March A. D. 1915.

[SEAL.]

ALVIN LANDRU,
Clerk of the District Court,
Yellow Medicine County, Minnesota.

10 cents Revenue Stamps cancelled.

367 STATE OF MINNESOTA,
County of Yellow Medicine:

District Court, Twelfth Judicial District.

H. W. OTOS, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

To Davis & Michel, Attorneys for Plaintiff, and Alvin Landru, Clerk of the District Court.

SIRS: You will please take notice that the Great Northern Railway Company, defendant in the above entitled action, appeals to the Supreme Court of the State of Minnesota from the judgment of this Court in this action entered on the 23rd day of February, 1915, in favor of said Plaintiff and against said Defendant in the sum of Thirty Two Thousand Three Hundred Fifty Seven and 35/100 Dollars ($32,357.35); and from the whole thereof.

M. L. COUNTRYMAN,
A. L. JANES,
Attorneys for Defendant.

203 Great Northern Building, St. Paul, Minnesota.

Dated at St. Paul, Minnesota, February 23rd, 1915.

STATE OF MINNESOTA,
County of Yellow Medicine, ss:

James H. Hall, being first duly sworn deposes and says that on the 23rd day of February, 1915, at the city of Granite Falls, Minn., he served the within notice of appeal upon Davis & Michel, Attorneys for Plaintiff personally, by then and there handing to and leaving with Ernest A. Michel, a member of the firm of Davis & Michel, a true and correct copy of said notice of appeal.

JAMES H. HALL.

Subscribed and sworn to before me this 23rd day of February, 1915.

[SEAL.]

ALVIN LANDRU,
Clerk Dist. Court,
Yellow Medicine County, Minn.

368 STATE OF MINNESOTA,
County of Yellow Medicine:

District Court, Twelfh Judicial District.

H. W. OTOS, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, Defendant.

Know all men by these presents, that we, Great Northern Railway Company, a corporation duly organized and existing under the laws of the State of Minnesota, as principal, and National Surety Company, a corporation organized and existing under the laws of the State of New York, and authorized to transact business and execute bonds in the State of Minnesota, as surety, are bound unto H. W. Otos, plaintiff in above entitled action, in the sum of thirty-five thousand dollars ($35,000.00) for the payment of which to the said H. W. Otos, his heirs, executors, administrators or assigns, we jointly and severally bind ourselves, our successors and assigns. The condition of this undertaking is such that: Whereas, the defendant in the above entitled action has appealed to the Supreme Court of the State of Minnesota from a judgment, and the whole thereof, entered in said action on the 23rd day of February, 1915. Now therefore, if the appellant, Great Northern Railway Company, shall pay all costs and charges which may be awarded against it on said appeal, not exceeding the sum of thirty-five thousand dollars ($35,000.00), and shall pay the amount directed to be paid by such judgment if it is affirmed or any part of such amount as to
369 which the judgment is affirmed, if it is affirmed only in part, and shall pay all damages which are awarded against the appellant on such appeal, then this obligation which is given in pursuance of General Statutes of Minnesota, 1913, Section 8004, shall be void; otherwise to remain in full force and effect. In Testimony Whereof the Great Northern Railway Company and National Surety Company have caused this instrument to be executed by their respective proper officers, thereunto duly authorized and their respective corporate seals to be hereunto affixed this 11th day of February, 1915.

GREAT NORTHERN RAILWAY COMPANY,
By L. W. HILL, *President.*

In presence of:
H. H. PARKHOUSE.
EARL W. McELROY. [SEAL.]

Attest:
L. E. KATZENBACH, *Secretary.*
NATIONAL SURETY COMPANY,
By C. M. BEND, *Its Attorney-in-Fact.*

WM. B. JOYCE, JR.
V. N. O'TOOLE.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 11th day of February, 1915, before me, personally appeared L. W. Hill and L. E. Katzenbach to me known, who being by me first duly sworn, did say that they are the president and secretary respectively, of the Great Northern Railway Company, the Corporation described in, and which executed the foregoing bond; that the seal affixed to said bond is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors; and the said L. W. Hill and L. E. Katzenbach acknowledged said bond to be the free act and deed of said corporation.

[SEAL.] FRANCES M. BARRETT,
Notary Public, Ramsey County, Minnesota.

My commission expires April 20, 1919.

370 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 11th day of February, 1915, before me appeared C. M. Bend, to me personally known, who being by me duly sworn did say that he is the attorney-in-fact of the National Surety Company, the corporation described in and who executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors, and said C. M. Bend acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] WM. B. JOYCE, JR.,
Notary Public, Ramsey County, Minnesota.

My commission expires Febr. 9, 1921.

The foregoing being in amount deemed sufficient, I hereby approve the above bond and the surety thereon.
Dated this 24th day of February, 1915.

G. E. QVALE,
Judge of the District Court of
Yellow Medicine County, Minnesota.

(Endorsed:) Filed Feb. 24, 1915. Alvin Landru, Clerk of Court.

371 STATE OF MINNESOTA,
County of Yellow Medicine:

District Court, Twelfth Judicial District.

H. W. OTOS, Plaintiff,
against
GREAT NORTHERN RAILWAY COMPANY, Defendant.

STATE OF MINNESOTA,
County of Yellow Medicine, ss:

To the Honorable Clerk of the Supreme Court of the State of Minnesota:

An appeal to the Supreme Court having been perfected on the date hereof, I, Alvin Landru, Clerk of the District Court for Yellow Medicine County, Minnesota, do herewith transmit to the Clerk of the Supreme Court a copy of the Notice and Bond upon Appeal to the Supreme Court, with all of the endorsements upon each.

And I hereby certify and return that I have compared the foregoing and within copy of said Notice and Bond upon Appeal and the endorsements thereon, in the above entitled action, with the originals now of record and on file in my office, and find the same and each of them to be a full, true and correct copy thereof, and the endorsements thereon.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 25th day of February, 1915.

[SEAL OF COURT.] ALVIN LANDRU,
Clerk of said District Court.

(Endorsed:) Filed Feb. 26, 1915. I. A. Caswell, Clerk.

372 STATE OF MINNESOTA:

Supreme Court, October Term, 1914.

H. W. OTOS, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Whereas, the above entitled action was duly tried and a verdict by the jury rendered in the District Court of Yellow Medicine County, Minnesota, against the defendant and in favor of the plaintiff,

And whereas, the defendant's alternative motion for a new trial or for judgment notwithstanding the verdict was duly presented and denied in said court,

And whereas, an appeal from said order was taken to this court,

And whereas, this Court duly considered the same and affirmed the order of the trial court,

And whereas, the plaintiff did thereafter duly cause judgment to

be entered in his favor and against the defendant in the sum of $32,357.35, which judgment was made and entered on the 23rd day of February, 1915,

And whereas, the defendant did immediately thereafter take an appeal from said judgment to this court,

And whereas, no questions are involved on said second appeal different from those involved on the first appeal,

Now therefore, it is agreed and stipulated by and between the parties respectively, thorugh their respective attorneys, that
373 said appeal from said judgment may be submitted to this court forthwith upon the same printed record and same briefs and assigbments of error as presented on the first appeal and without oral argument.

Dated March 1, 1915.

(Signed) DAVIS & MICHEL,
Attorneys for Respondent.
M. L. COUNTRYMAN, AND
A. L. JANES,
Attorneys for Appellant.

(Endorsed:) Filed Mar. 6, 1915. I. A. Caswell, Clerk.

374 18955.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 182.

H. W. OTOS, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

PER CURIAM:

This appeal involves only questions which were determined on appeal from an order denying a motion for a new trial in the same case, 150 N. W. 922. For the reasons there given, the judgment now appealed from is affirmed.

(Endorsed:) Per Curiam Opinion. Filed March 9, 1915. I. A. Caswell, Clerk.

375 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 182.

H. W. OTOS, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Pursuant to an order of Court duly made and entered in this cause March 12, A. D. 1915.

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Twelfth Judicial District, sitting within and for the County of Yellow Medicine be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of Thirty-two Thousand Five Hundred Seventy-one and 73/100 dollars, ($32,571.73), costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed March 12, A. D. 1915.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs, $25.00; Printer, $—; Clerk, $5.00; Acknowledgments, $—; Supreme Court judgment and interest on first appeal, $92.75; Return, $—; Postage and Express, $—; Filing Mandate, $—; District Court judgment and interest, $32,448.98; Total, $32,571.73.

376 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, March 12, A. D. 1915.

[SEAL.] I. A. CASWELL, *Clerk.*

STATE OF MINNESOTA,
Supreme Court:

Transcript of Judgment.

Filed March 12, A. D. 1915. I. A. Caswell, Clerk.

377 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1914.

No. 182.

H. W. Otos, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Appeal from District Court, Twelfth Judicial District, County of Yellow Medicine.

This cause having been duly argued and submitted at the General October Term of this court A. D. 1914, upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, in all things affirmed and that judgment be entered accordingly.

Entered March 12, A. D. 1915.

By the Court.

Attest:

I. A. CASWELL, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

[SEAL.] I. A. CASWELL, *Clerk.*

(Endorsed:) Filed March 12, 1915. I. A. Caswell, Clerk.

378 No. 18955. State of Minnesota, Supreme Court. H. W. Otos, Respondent, vs. Great Northern Railway Company, Appellant. Judgment Roll. (Endorsed:) Filed March 12, 1915. I. A. Caswell, Clerk.

379 *Authentication of Record.*

SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of H. W. Otos, Respondent, vs. Great North-

ern Railway Company, Appellant, and also of the assignments of error to said court and of the opinion of the court rendered therein, as the same now appear on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 18th day of March, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

380 In the Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
H. W. OTOS, Defendant in Error.

Assignments of Error.

Comes now the Great Northern Railway Company, Plaintiff in Error, in the above entitled cause, and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of Minnesota erred to the grevious injury and wrong of the Plaintiff in Error herein, and to the prejudice and against the rights of the Plaintiff in Error, in the following particulars, to-wit:

I.

The said Supreme Court erred in affirming the judgment entered in the District Court in favor of the Plaintiff in Error.

II.

The said Supreme Court erred in holding that at the time Defendant in Error was injured the car with the defective coupling apparatus was being used in interstate commerce and that the provisions of the Federal Safety Appliance Act were applicable thereto.

III.

The said Supreme Court erred in holding that the Defendant in Error at the time he was injured was engaged in work connected with the movement of interstate commerce within the provisions of the Federal Employers' Liability Act.

IV.

The said Supreme Court erred in holding that the car with the defective coupling apparatus had not been withdrawn from
381 interstate commerce at the time Defendant in Error was injured and that the Federal Safety Appliance Act was applicable thereto.

V.

The said Supreme Court erred in holding that the proximate cause of the injury of Defendant in Error was the defective condition of the coupling apparatus, where it appeared that at the time Defendant in Error was injured he was engaged in violating one of the rules of the Plaintiff in Error.

VI.

The said Supreme Court erred in holding that the proximate cause of the injury of Defendant in Error was due to a violation of the Federal Safety Appliance Act.

VII.

The said Supreme Court erred in holding that whether Defendant in Error was engaged in interstate commerce within the provisions of the Federal Safety Appliance Act and the Federal Employers' Liability Act under the evidence in the case was a question of law and not one of fact for the jury.

VIII.

The said Supreme Court erred in holding that at the time Defendant in Error was injured he was acting within the scope of his employment and in the discharge of his duties in going between the cars to make the uncoupling and that the Federal Safety Appliance Act and the Federal Employers' Liability Act were applicable.

IX.

The said Supreme Court erred in holding, under the evidence in this case, that the car with the defective coupling apparatus, at the time of the accident, was being hauled or used by the Plaintiff in Error within the provisions of the Federal Safety Appliance Act and the Federal Employers' Liability Act.

X.

382 The said Supreme Court erred in holding that the car with the defective coupling apparatus, which after the train in which it was carried had arrived at its destination, was being removed from said train to a repair track solely for the purpose of repairs, was engaged in interstate commerce and that the Federal Safety Appliance Act was applicable thereto and the Federal Employers' Liability Act was applicable to the Defendant in Error, who was injured in connection therewith.

XI.

The said Supreme Court erred in holding that the damages allowed to the Defendant in Error were not excessive.

Wherefore, for these and other manifest errors appearing in the record, the said Great Northern Railway Company, Plaintiff in Error, prays that the judgment of the said Supreme Court of the State of Minnesota be reversed and set aside and held for naught, and that judgment be rendered for Plaintiff in Error granting it its rights under the statutes of the United States, and Plaintiff in Error also prays for judgment for its costs.

E. C. LINDLEY,
Attorney for Great Northern Railway Company, Plaintiff in Error.

M. L. COUNTRYMAN,
A. L. JANES,
Of Counsel.

382½ [Endorsed:] 18955. In the Supreme Court of the United States. Great Northern Railway Company, Plaintiff in Error, vs. H. W. Otos, Defendant in Error. Assignments of Error. Filed Mar. 12, 1915. I. A. Caswell, clerk.

383 In the Supreme Court of the State of Minnesota.

H. W. Otos, Respondent,
vs.
Great Northern Railway Company, Appellant.

Petition for a Writ of Error.

To the Honorable Justices of the Supreme Court of the State of Minnesota:

Your Petitioner, the above named Great Northern Railway Company, respectfully shows that on the 12 day of March 1915, the Supreme Court of the State of Minnesota rendered a final judgment against your Petitioner in a certain case wherein your Petitioner was defendant, and H. W. Otos was plaintiff, as will appear by reference to the record and proceedings in said case, and that the said court is the highest court of law or equity in said state in which a decision in said suit could be had; that by the said suit there was drawn in question the construction of certain statutes of the United States relating to the liability of common carriers by railroad to their employes engaged in commerce between any of the several states or territories, and the decision of this court is against the right claimed by the said Great Northern Railway Company, Appellant, and as it believes, contrary to the statutes of the United States relating to the liability of common carriers by railroad to their employes engaged in interstate commerce, and against the right of the said Great Northern Railway Company thereunder, all of which will more fully appear in detail from the assignments of error filed herein.

Wherefore, the said Great Northern Railway Company
384 prays that a writ of error may issue to the Supreme Court of the State of Minnesota for the correcting of the error com-

plained of, and that a duly authenticated transcript of the record, proceedings and papers therein may be sent to the United States Supreme Court.

GREAT NORTHERN RAILWAY COMPANY,
By E. C. LINDLEY,
Attorney for Respondent.

M. L. COUNTRYMAN,
A. L. JANES,
Of Counsel.

385 In the Supreme Court of the State of Minnesota.

H. W. OTOS, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Order Allowing Writ of Error.

Comes now the Great Northern Railway Company, the Appellant above named, on this 12th day of March, 1915, and files and presents to this Court its petition praying for the allowance of a writ of error intended to be urged by it, and praying further that the duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this Court desiring to give petitioner an opportunity to test in the Supreme Court of the United States the question herein presented.

It is ordered by this court that a writ of error be allowed as prayed, provided, however, that the said Great Northern Railway Company, appellant, give bond according to law in the sum of Thirty-five Thousand Dollars ($35,000.00), which bond shall operate as a supersedeas bond.

In testimony whereof, Witness my hand this 12th day of March 1915.

CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

386 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Minnesota, before you, or some of you, being the highest

court of law or equity of the said state, in which a decision could be had in the said suit between H. W. Otos, Plaintiff and Respondent, and the Great Northern Railway Company, Defendant and Appellant, wherein, was drawn in question the construction of a clause of the constitution or statute of the United States, and the decision was against the right or privilege specially set up or claimed under the said clause of the *construction* or statute, a manifest error hath happened, to the great damage of the said Great Northern Railway Company as by its complaint appears. We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this return, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the *same* SupremeCourt may cause further to bedone therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States this 12th day of March, in the year of our Lord, One Thousand Nine Hundred and Fifteen.

Done in the City of St. Paul, County of Ramsey, State of
387 *of* Minnesota, with the seal of the District Court of the United States for the District of Minnesota attached.

[Seal U. S. Dist. Court, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States for the District of Minnesota.

Allowed by:
CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

387½ [Endorsed:] 18955. In the Supreme Court of the State of Minnesota. H. W. Otos, Respondent, vs. Great Northern Railway Company, Appellant. Petition for Writ of Error. Order Allowing Writ of Error. Writ of Error. Filed Mar. 15, 1915. I. A. Caswell, Clerk.

388 Know all men by these presents, that we, Great Northern Railway Company, a corporation organized and existing under the laws of the State of Minnesota, as principal, and National Surety Company, a corporation of the state of New York, as surety, are held and firmly bound unto H. W. Otos in the sum of Thirty-five Thousand Dollars ($35,000.00) to be paid to the said obligee, his heirs, representatives and assigns, for the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of March, 1915.

Whereas, lately in the Supreme Court of the State of Minnesota, in a suit pending in said Court wherein H. W. Otos was respondent and Great Northern Railway Company was appellant, judgment was entered against the said appellant, and said appellant seeks to prosecute its writ of error in the Supreme Court of the United States to reverse the judgment rendered in the said suit.

Now therefore, the condition of this obligation is such that if the above named appellant, Great Northern Railway Company, shall prosecute its said writ of error to effect and pay all costs and damages, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

GREAT NORTHERN RAILWAY COMPANY,
By J. M. GRUBER, *Vice-President.* [SEAL.]

Attest:
L. E. KATZENBACH, *Secretary.*

NATIONAL SURETY COMPANY,
By L. A. GREEN, *Its Attorney in Fact.* [SEAL.]

I. J. SWAN.
H. E. MILLER.
IVAN CERDARLEAF.

[On margin:] O. K. E. C. L.

389 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 12th day of March, 1915, before me appeared J. M. Gruber, to me personally known, who, being by me duly sworn, did say that he is the Vice President of the Great Northern Railway Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed on behalf of said corporation by authority of its Board of Directors: and said J. M. Gruber acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] FRANCES M. BARRETT,
Notary Public in and for the State of Minnesota, County of Ramsey.

My commission expires April 20, 1919.

390 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 12th day of March, 1915, before me appeared L. A. Green, to me personally known, who, being by me duly sworn, did say that he is the Attorney in Fact of the National Surety Company; that the seal affixed to the foregoing instrument is the corporate seal of aforesaid corporation, and that said instrument was executed on behalf of said corporation, and that said instrument was executed on behalf of said corporation by authority of its board of directors, and said

L. A. Green acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] IVAN CEDARLEAF,
Notary Public in and for the State of Minnesota, County of Ramsey.

My commission expires June 2nd, 1920.

The within bond is this 12th day of March, 1915, approved.
CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

(Endorsed:) Filed Mar. 12, 1915. I. A. Caswell, Clerk.

390½ [Endorsed:] In the Supreme Court of the United States. Great Northern Railway Company, Plaintiff in Error, vs. H. W. Otos, Defendant in Error. Bond.

391 *Certificate of Lodgment.*

SUPREME COURT,
State of Minnesota, ss:

I, I. A. Caswell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on the 12th day of March, 1915, in the case of W. H. Otos, Respondent, vs. Great Northern Railway Company, Appellant:

1. The original bond, of which a copy is herein set forth;
2. Copies of the writ of error, as herein set forth—one for defendant in error and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this 18th day of March, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

392 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to H. W. Otos, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C. within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the state of Minnesota, wherein the Great Northern Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in said Writ of Error mentioned, should not

be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Calvin L. Brown, Chief Justice of the Supreme Court of the State of Minnesota, this 12th day of March, 1915.

CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

We, the undersigned attorneys of record for H. W. Otos, Defendant in Error in the above entitled case, hereby acknowledge due service of the above citation.

DAVIS & MICHEL.

392½ [Endorsed:] In the Supreme Court of the United States. Great Northern Railway Company, Plaintiff in Error, vs. H. W. Otos, Defendant in Error. Citation. Filed Mar. 22, 1915. I. A. Caswell, Clerk.

393 *Return to Writ.*

UNITED STATES OF AMERICA, *ss:*

Supreme Court of Minnesota.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Minnesota, in the city of St. Paul, Minnesota, this 18th day of March, 1915.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

Costs of transcript $98.25, paid by Great Northern Railway Company.

Endorsed on cover: File No. 24,666. Minnesota Supreme Court. Term No. 429. Great Northern Railway Company, plaintiff in error, vs. H. W. Otos. Filed April 10th, 1915. File No. 24,666.

17

Office Supreme Court, U. S.
FILED
NOV 6 1915
JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 429.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

H. W. OTOS,
Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR.

E. C. LINDLEY,
Attorney for Plaintiff in Error.

M. L. COUNTRYMAN
and
A. L. JANES,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 429.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

H. W. OTOS,
Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a personal injury action, brought under the Federal Employers' Liability Act and Safety Appliance Act. Defendant in error obtained a verdict of $35,000.00 for injuries sustained while in

the employ of plaintiff in error as a switch foreman in its yards at Willmar, Minnesota, which injuries resulted in the amputation of his leg near the hip joint. He also claimed that his sexual powers had been destroyed and his back injured as a result of the accident.

The trial court reduced the verdict to $30,000.00 and upon appeal to the Supreme Court of Minnesota the verdict was sustained. The case comes to this court by writ of error perfected March 12, 1915.

STATEMENT OF FACTS.

Defendant in error was a switch foreman employed by plaintiff in error in its yards at Willmar, Minnesota. On September 11, 1912, a freight train arrived at Willmar from the west. It contained a car loaded with wheat at Willow Lakes, South Dakota, consigned to Minneapolis, Minnesota. The station of Willmar is a division point on the line of railway of plaintiff in error. At this station the train was to be broken up and the cars therein sent to their several destinations in different trains. Before the train was broken up, and immediately upon arrival, each of the cars was inspected. It was found by such inspection that the lifting lever of the automatic coupling apparatus on car No. 125896 was missing and that the couplers did not couple upon impact. It was also discovered that the buffer iron was broken and some

rivets needed repairing. The inspector thereupon placed on that car two green pasteboard cards about 4″x8″ in size with the words "Repair Track" printed in large black letters thereon. These cards notified the switch foreman that the car should be transferred to the repair track in the Willmar yards and there remain until the necessary repairs had been made. The defects discovered by the car inspector were of such nature as to necessitate sending the car to the repair track, and its journey was thus interrupted until the repairs thereon were made. The superintendent of the Willmar yards had designated for that day track No. 10 as the track on which defective cars were to be repaired. After the train had been inspected it was the duty of the defendant in error, as the foreman of a switching crew, to transfer the cars to the several tracks in the Willmar yards provided therefor. He received from the superintendent a "switch list" which designated the track on which each of the cars in the train should be placed. After receiving that list he personally superintended the switching of the cars to the several tracks. He knew that car No. 125896 was defective before it was removed from the train. He determined the order in which the several cars in the train should be removed therefrom and placed upon the proper side track. The movement of the switch engine while making the transfer of cars was entirely subject to his personal direction and control. At the time he was injured the switch engine, by his order, was coupled to the

defective car with several other cars. The defective car was the seventh or eighth car from the engine. He had directed his switchman to open the switch on track No. 6 and immediately upon opening this switch, to open the switch on track No. 10, and had informed the switchman that the end car was to be placed on track No. 6 and the next car, the defective car, No. 125896, was to be placed on track No. 10, the repair track. To thus move these cars he gave the engineer the usual "back up" signal and when the cars were properly in motion he gave a "stop" signal, and before the cars had stopped he stepped in between the defective car and the end car, the one that was going in on track No. 6, for the purpose of lifting the pin. He in some manner lost his balance or caught his foot in a switch point and fell, the car running over his leg. It was not necessary for him to go between the cars while they were in motion to pull the pin. He could have pulled the pin while the cars were stopped, or he could have pulled it by using the pin lifter on the end car from the opposite side, or his switchman could have pulled it.

In going between the moving cars to make the uncoupling defendant in error violated a strict rule of the company, with which he was familiar. Long prior to the accident he had received a postal card notice of the importance of this rule and had signed an admission of its receipt. There was no evidence whatever that the rule had been habitually disregarded or disobeyed. In rebuttal defendant in error testified that it had been customary for several

months previous to the accident when a pin lifter was missing to step in between the cars and pull the pin, and that the yardmaster had seen him step in between cars. He did not, however, testify that he ever before had stepped in between cars *when they were moving.* He did testify that it was not necessary for him to go between the cars while in motion, that he could have made the uncoupling in the manner here suggested. He had no orders from anyone to do what he then did. He was, as before stated, in full charge and control of the entire operation. He could have removed the defective car from the train without any car being coupled to the defective coupler. He voluntarily chose, knowing the defective condition of the car, to make the movement in the manner in which it was done.

Upon the foregoing facts the trial court held, and the Supreme Court of Minnesota affirmed it, that as a matter of law, under the Safety Appliance Act, plaintiff in error was liable as an insurer, regardless of any question of negligence or contributory negligence.

ASSIGNMENTS OF ERROR.

I.

The Supreme Court of Minnesota erred in affirming the judgment entered in the District Court in favor of the defendant in error.

II.

The said Supreme Court erred in holding that at the time defendant in error was injured the car with the defective coupling apparatus was being used in interstate commerce and that the provisions of the Federal Safety Appliance Act were applicable thereto.

III.

The said Supreme Court erred in holding that the defendant in error at the time he was injured was engaged in work connected with the movement of interstate commerce within the provisions of the Federal Employers' Liability Act.

IV.

The said Supreme Court erred in holding that the car with the defective coupling apparatus had not been withdrawn from interstate commerce at the time defendant in error was injured and that the Federal Safety Appliance Act was applicable thereto.

V.

The said Supreme Court erred in holding that the proximate cause of the injury of defendant in error was the defective condition of the coupling apparatus, where it appeared that at the time defendant in error was injured he was engaged in violating one of the rules of the plaintiff in error.

VI.

The said Supreme Court erred in holding that the proximate cause of the injury of defendant in error was due to a violation of the Federal Safety Appliance Act.

VII.

The said Supreme Court erred in holding that whether defendant in error was engaged in interstate commerce within the provisions of the Federal Safety Appliance Act and the Federal Employers' Liability Act under the evidence in the case was a question of law and not one of fact for the jury.

VIII.

The said Supreme Court erred in holding that at the time defendant in error was injured he was acting within the scope of his employment and in the discharge of his duties in going between the cars to make the uncoupling and that the Federal Safety Appliance Act and the Federal Employers' Liability Act were applicable.

IX.

The said Supreme Court erred in holding, under the evidence in this case, that the car with the defective coupling apparatus, at the time of the accident, was being hauled or used by the plaintiff in error within the provisions of the Federal Safety Appliance Act and the Federal Employers' Liability Act.

X.

The said Supreme Court erred in holding that the car with the defective coupling apparatus, which after the train in which it was carried had arrived at its destination was being removed from said train to a repair track solely for the purpose of repairs, was engaged in interstate commerce and that the Federal Safety Appliance Act was applicable thereto and that the Federal Employers' Liability Act was applicable to the defendant in error, who was injured in connection therewith.

CONTENTION OF PLAINTIFF IN ERROR.

The plaintiff in error here contends that the defective car was not engaged in commerce at the time defendant in error was injured; that at said time such car was withdrawn from its interstate journey; that in withdrawing such car from commerce, to be repaired, it had complied with the federal statutes; and that it cannot be held liable in this action without proof of actual negligence.

Stated in another way, plaintiff in error contends that its paramount duty at the time of the

injury to the defendant in error was, in the language of the statute, to *cease* "to haul or to permit to be hauled or used on its line" the defective car " * * * in moving interstate traffic"; that the performance of this paramount duty required the plaintiff in error to haul or move said car from the train wherein it was found; that the act of hauling or moving said car from said train was not a movement of said car in interstate commerce, but was a necessary movement of said car to withdraw the same from interstate commerce.

Contention of Defendant in Error.

It is the contention of defendant in error that if a car is loaded with interstate commerce and becomes defective on its journey, such car is engaged in commerce from the time it was loaded until it arrives at its destination and the cargo is delivered. In other words, that however defective the car may be, it cannot be withdrawn from commerce within the provisions of the federal statute, even though such car may be at rest on one of the repair tracks of the railway company, or in one of its shops, or in the process of being taken thereto, that the company while so moving the car violates the Federal Safety Appliance Act.

BRIEF.

I.

A WRONG OR TORT CANNOT BE FOUNDED UPON A NON-NEGLIGENT NECESSARY ACT PERFORMED PURSUANT TO A PARAMOUNT DUTY.

Cooley on Torts, Second Edition, 791.
Bigelow on Torts, 64.
Pollock on Torts, 19.
Scammon v. Chicago, 25 Ill. 424.

II.

A CAR, EVEN THOUGH LOADED WITH INTERSTATE COMMERCE, WHILE BEING TAKEN TO A REPAIR TRACK FOR NECESSARY REPAIRS OF DEFECTS DISCOVERED BY INSPECTION IN TRANSIT, IS NOT ENGAGED IN INTERSTATE COMMERCE, AND SUCH MOVEMENT IS NOT A VIOLATION OF THE FEDERAL SAFETY APPLIANCE LAW. IT IS A NECESSARY ACT DONE IN COMPLIANCE WITH THE STATUTORY DUTY.

Tex. & Pac. Ry. Co. v. Rigsby, 222 Fed. Rep., 221.
Delk v. St. L. & S. F., 220 U. S. 580.

I.

A WRONG OR TORT CANNOT BE FOUNDED UPON A NON-NEGLIGENT NECESSARY ACT PERFORMED PURSUANT TO A PARAMOUNT DUTY.

Plaintiff in error contends that when in the performance of the duty resting upon it to exercise

due diligence in maintaining its equipment in compliance with the Safety Appliance Act, it inspected its train on the arrival thereof in the Willmar terminal and found the defective car in question, it became its paramount duty to at once withdraw said defective car from further use and not again to haul the same until it had been properly repaired. Certainly plaintiff in error was not required to leave its train in a static condition when, as the record shows, the defective car could not be repaired without the removal thereof to a repair track. Plaintiff in error had a right to adopt reasonable rules to govern in the performance of duties resting upon it. Pursuant to such rules it had inspected and found the defective car. Pursuant to such rules it then became the duty of the defendant in error, as switch foreman, to cut the defective car out of the train. The record discloses the defendant in error had the absolute right to determine the order in which he would move the cars in the train in order to cut out the defective one, except only the company had adopted a rule which he should have observed, to the effect that in performing the duty resting upon the company, to cut out the defective car, he should not have gone between the defective car and the one to which it was coupled while the same were in motion.

In Scammon v. City of Chicago, 25 Ill. 424, the court says:

> All liability for injury sustained "is based upon the theory that the party liable has committed a wrong, or neglected some duty. That direct or consequential injury has resulted from the employment of immediate force, or the negligent performance of some legal duty, or in the negligent use of persons or property, whereby an injury has resulted to another."

Bigelow, at Page 64, says:

> "One tort is as perfect as another and each tort differs from the others in its legal constituents. But they all have this in common, that there must be a breach *of duty paramount*, or, as we shall now put it, established by municipal law; and they all lead to an action for damages. These facts must furnish our definition. Accordingly a tort may be said to be a breach of duty established by municipal law, for which a suit for damages can be maintained; or conversely, the infringement of a private right, or a public as a private right, established by municipal law."

Cooley, at page 791 of his work on torts, second edition, says:

> "The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed. A duty may be general, and owing to everybody, or it may be particular, and owing to a single person only, by reason of his peculiar position. * * * But a duty owing to everybody can never become the foundation of an action until some individual is placed in position which gives him particular occasion to insist upon its performance: it then becomes a duty to him personally."

See also Pollock on Tort, 19.

Whatever may have been the duty of the plaintiff in error prior to the discovery of the defective

car at Willmar, upon its discovery its paramount duty was to cut the car out, and to that end it had a right to establish an organization for the performance of such a duty. After the discovery of the defective car the defendant in error was the principal representative of the plaintiff in error in the performance of the mandatory duty resting upon the plaintiff in error. It is a contradiction in terms for the defendant in error to charge the plaintiff in error with a negligent breach of a duty owing him on account of the performance by himself of a necessary non-negligent act (unless he was negligent in going between the moving cars), done in the line of his employment in the performance of a paramount duty resting upon the plaintiff in error.

II.

A CAR, EVEN THOUGH LOADED WITH INTERSTATE COMMERCE, WHILE BEING TAKEN TO A REPAIR TRACK FOR NECESSARY REPAIRS OF DEFECTS DISCOVERED BY INSPECTION IN TRANSIT, IS NOT ENGAGED IN INTERSTATE COMMERCE, AND SUCH MOVEMENT IS NOT A VIOLATION OF THE FEDERAL SAFETY APPLIANCE LAW. IT IS A NECESSARY ACT DONE IN COMPLIANCE WITH THE STATUTORY DUTY.

The question here presented is, does an interstate carrier violate the Safety Appliance Act when it is engaged in removing a car, loaded with interstate freight, that has become defective within the provisions of the Safety Appliance Act, from an inter-

state train to its shops or repair tracks at a division point? The trial court instructed the jury that—

> "if the plaintiff in the discharge of his duties went between the cars for the purpose of uncoupling them, and that the injuries he received were due directly to the absence and imperfect working conditions of the coupler in question, then the defendant would be liable to the plaintiff for damages in this action." (Record, p. 177.)

This instruction was affirmed by the Supreme Court of Minnesota. This view of the law by the state courts made the plaintiff in error an insurer of the safety of its employes while engaged in necessarily removing defective cars from trains to a suitable place of repair. It was not denied by the state courts that the paramount duty of the plaintiff in error when it discovered that the car in question had a defective coupler thereon was to remove the same from commerce and not to use the car in commerce again until it was repaired.

If plaintiff in error used this car on its line, in moving interstate traffic, after it became defective, it was clearly liable to a penalty as provided by Sections 1 and 2 of the Act of March 2, 1893 (27 Statutes at Large, Chapter 196, page 531). Plaintiff in error, in an effort to comply with that statute, was taking the car to its repair tracks for the purpose of repairing the defective coupler. The evidence shows that the necessary repairs could not be made without transferring the car to the repair track. The accident happened while the car was so

being transferred. Section 2 of the statute above cited provides:

> "It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

This statute is applicable only to cars that are used in moving interstate traffic. The placing of the car upon the repair track for the purpose of necessary repairs was not an incident necessary to the transportation of the commerce in the car. This movement of the car became necessary only when the car became defective.

It would seem that to hold the statute violated upon the facts of this case is to penalize the plaintiff in error for attempting to do exactly what the statute required it to do, namely, to remove the car from commerce when it became defective. If plaintiff in error is an insurer of its employes working about such a car while in the course of necessary removal to its repair tracks or shops, it logically follows that it is also an insurer of employes working about the car while such car is on its repair tracks or in its repair shops. If the ruling of the state court be correct, then a car when loaded with interstate freight is always engaged in "moving interstate traffic" or being "used" in interstate traffic, even though such car may be on a repair track or in the shop of the carrier for repairs. We submit that if it is unreasonable to penalize a carrier

for complying with the act as to a defective car which has been placed at rest in its shops, or on its repair tracks, it must be equally unreasonable to penalize the carrier while attempting to place the car in its repair shops or on its repair track. Whether this car actually did go to the repair track is immaterial, for the trial court refused to submit as a question of fact to the jury for its determination whether or not the car had been withdrawn from commerce, and held as a matter of law, as did the Supreme Court of Minnesota, that such car was actually engaged in moving interstate traffic at the time of the accident, regardless of what was being done with the car, or the purpose of the carrier in making the movement at the time of the accident.

The position of the plaintiff in error in this case is well stated in the language of Pardee, Circuit Judge (dissenting) in the case of Texas & Pacific Ry Co. v. Rigsby, 222 Fed. Rep. at page 223, decided April 29, 1915—

> "It is not proven nor claimed that the car in which Rigsby was injured was at the time being used in either interstate or intrastate traffic, or even being used at all. The undisputed facts appear to be that the car was out of use because of defective condition and had been for more than a month, and at the time Rigsby was hurt was not being moved for use. It was marked or labeled on each side with 'bad order' tag, and was being moved from the bad-order track to the railroad shop for the purpose of being repaired and put in order for use. The liability of the railroad company in moving the car is not in any wise claimed as based upon *use* of the same, and

only because in moving the car to the shop for repairs it was for a very short distance required to be removed over a portion of the main track, so as to reach the railroad shop. To move the car to the shop was the only way the car could be put in order for use in any traffic. It could hardly have been intended by Congress that a railroad company under heavy penalties should keep its cars in perfect order, with certain specific safety appliances and otherwise, and yet that, after a disabled car has been taken entirely out of commerce, not to be used for any traffic whatever, the railroad company is to be penalized in favor of employes fully advised and warned that the car was in bad order and was to be moved only to the shop for repairs, for taking the only practical means at hand to have the car repaired and put in order.

Certainly, under the harshest view to be taken of the requirements of the act of Congerss, to penalize the railroad the out-of-order or disabled car must be *used* on a railroad engaged in interstate commerce; and in the Rigsby Case the question was whether the disabled car on which Rigsby was injured was at the time being *used* within the meaning and purview of the said act of Congress, and this under the evidence in the case was a question of fact which should have been submitted to the jury."

The decision of the majority of the Circuit Court of Appeals in that case rests upon the important fact that there was an absence of proof of necessity for moving the defective car at the time of the injury.

"There was an absence of evidence tending to prove that the defect which caused the injury could not as well have been repaired or removed without making the movement of the car which had been partially executed when the injury occurred."

Evidently it was the view of the circuit court of appeals that if it was in fact necessary to make the movement in question for the purpose of taking the car to the repair track, such movement was not a violation of the Federal Safety Appliance Act. The evidence in the case at bar is undisputed that it was necessary to remove the defective car to the repair track.

The state courts regarded the decision of this court in Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, conclusive against the company's contention in this case. We are not able to convince ourselves that the decision in the Delk case was intended by this court to go so far as to preclude the possibility of defense in any case of injury to a train employe growing out of a defective safety appliance upon a car being moved not for the purpose of transportation, but solely for the purpose of placing it upon the nearest repair track for the purposes of repair.

As we understand the facts in the Delk case the car with the defective coupling apparatus had not been placed upon a repair track nor was there any intention of so placing it. The defect had been observed and a "bad order" card placed on the car, which was then standing on a team track. The intention was to obtain from the repair shop, two and one-half miles distant, the material for repairing the coupler on this car, but before any repairs had been made the following operations occurred:

"The cars were on the track, extending in the general direction of east and west, the engine being on the western end of the nine cars. The nine cars were drawn off this team track onto the lead track. The easternmost two cars, being empties, were left on the lead track. The remaining seven cars were then pushed back on the team track. The easternmost two cars of the seven cars loaded with brick, were left on the team track. The remaining five cars were again drawn onto the lead track, and three cars loaded with coal were left thereon. The engine, with the remaining two cars, again went upon the team track, and defendant in error undertook to couple the eastern end of the two cars attached to the engine to the western end of the two cars just left on the team track, but, owing to a defect in the coupler on the eastern end of the two cars attached to the engine, the coupling could not be made without a man going between the ends of the cars. The defect on car K. C., F. S. & M. 21,696, was this: The chain connecting the uncoupling lever to the lock pin or lock block was disconnected, owing to a break in the lock pin or lock block. The drawbar also had a lateral motion of 4 inches. Defendant in error undertook to hold the drawbar away with his foot from the side upon which he stood, so that the two couplers could couple by impact. In so doing, his foot was badly injured." (p. 583.)

In other words this defective car being used in interstate commerce and coupled to other cars was, after discovery of the defect,—

(a) taken off the team track on to the lead track;

(b) two empty cars in the string were there cut off and left on the lead;

(c) the remaining cars were then pushed back on the team track;

(d) two cars loaded with brick were left there;

(e) the remaining five cars, including the defective car, were again drawn on to the lead, three loaded cars were left there;

(f) the engine with remaining two cars, one of which was the defective car, again went upon the team track and while these two cars were being uncoupled the injury occurred.

It is to be observed that the defendant in the Delk case contended that the car in question had been laid by for repair and hence was not being moved in interstate commerce. It is to be further observed that Mr. Justice Lurton, then a member of that court, was of the opinion that the evidence in the record justified a submission of that question to the jury. The majority of the Circuit Court of Appeals was of the opinion that upon the facts disclosed there was no question for the jury; that the car was moving in interstate commerce; and this court upheld the majority.

> "After the coupler became defective, and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it or to permit it to be hauled or used on its line. *It then became the duty of the railroad company to withdraw the car from use, and have it repaired to conform with the law before using it further.* It did not do this but continued to use the car in its defective condition. It could only do this under the penalty of the law. The car

> was defective, liable at any time to cause an accident, and it could not be kept in use *at the constant risk of a serious accident,* either upon the excuse that it would be inconvenient to withdraw it from the service or that the company had sent for the required appliance and would repair the car when it should be received. * * * This is a case peculiarly within the provisions of the act." (Italics ours.)
>
> "A car loaded and being used in moving interstate traffic was found with a defective coupler. The car was marked 'in bad order' and a repair piece sent for. After thus being notified of its condition the car should have been withdrawn; but it was not and the company kept on moving it about in connection with other cars and finally ordered the injured employe to couple it to another car. This he tried to do with the natural result and he has been crippled for life." (p. 585.)

This court concurred with the majority of the Circuit Court of Appeals that the car in question was being used in interstate traffic when the plaintiff was injured.

This then is the precise holding in the Delk case: A car known to have a defective coupler is, while being moved in switching operations from one track to another in the yards, still being used in interstate traffic and the Safety Appliance Act applies to it, notwithstanding it has previously been carded as in bad order and the intention exists to repair it at some future time.

In the present case a very different state of facts is presented. A car moving in interstate traffic upon arrival at a division point is upon inspection found with a defective coupler. Thereupon the plaintiff in error, pursuant to its paramount

duty as declared by the above quotation from the Delk case, prepared "to withdraw the car from use and have it repaired to conform with the law before using it further." The paramount duty of the plaintiff in error can only be performed by it through its agents. The performance of the paramount duty of the plaintiff in error, to withdraw the car in question from further use, rested upon defendant in error as the switch foreman of the yard wherein the car for the first time was found to be defective. A repair card is placed upon it. The train of which it is a part is thereupon taken charge of by the switch foreman, the plaintiff in this case. His admitted duty is to take that defective car to the nearest repair track where it is to remain until repaired. He has no orders or instructions to do anything else with that car except to move it from the train to the designated repair track. His orders are strict not to attempt to uncouple it by going between the cars while moving. He signals the engineer to back up the string in which the defective car is the last car but one, and while the cars are moving towards the repair track he steps between the defective car and the adjoining car contrary to orders and is injured. His only reason for going between the cars at that time was to cut off from the defective car another car which he did not intend to leave on the repair track with it.

At the time of the accident the company was in good faith endeavoring to comply with the letter and spirit of the Safety Appliance Law. It was not at that time using the car for interstate traffic

but was using it for the sole purpose of completely withdrawing it from such traffic for repair purposes.

It is respectfully submitted that the plaintiff in error did not violate the Federal Safety Appliance Act while engaged in moving the car to its repair track; that the car had been withdrawn from commerce and the Safety Appliance Act was not applicable thereto, and whether or not the car at said time was engaged in, or being used in, the movement of interstate traffic was at least a question of fact for the jury; that the judgment of the Supreme Court of the State of Minnesota should be reversed.

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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 429.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

H. W. OTOS,
Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

REPLY BRIEF OF PLAINTIFF IN ERROR.

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REPLY BRIEF OF PLAINTIFF IN ERROR.

It is stated in the Reply Brief filed by defendant in error upon the motion to dismiss, that there is no real dispute as to the facts, and for the purpose of that motion counsel for defendant in error adopted verbatim the Statement of Facts contained in the brief filed by plaintiff in error upon that motion. However, in the brief filed by defendant in error upon the merits, it seems to be con-

tended that the evidence fails to show that the defective car was, at the time of the accident, being moved solely for the purpose of transferring it to track number 10, the repair track, for the purpose of repairing the automatic coupling apparatus. Counsel's seeming change of front is probably due to their apparent inability to make any successful answer to the proposition of law that a tort cannot be founded upon a necessary non-negligent act performed pursuant to a paramount duty. They, therefore, are driven to the necessity of (a) questioning that which was admitted in their brief on the motion to dismiss, namely, that the defective car in question at the time of the injury was being cut out of an interstate train for the purpose of repair; (b) asserting that the amendment of 1910 increased the liabilities of interstate carriers for injuries sustained by employes.

In the hope of setting at rest any question which may be raised as to what facts are actually shown by the record in this case, we purpose to quote from the record in support of the following propositions:

(a) It was necessary to remove the defective car from the train in order to make the needed repairs, and at the time of the injury the car was being removed for that purpose.

(b) The defendant in error was the representative of the plaintiff in error in the performance of the paramount duty resting upon the plaintiff in error, and had complete and uncontrolled authority as to the manner in which he would remove the defective car from the train in which it was found. He alone determined the movements incident to cutting the car out.

Hereafter we shall endeavor to show that the amendment of 1910 did not enlarge the liability of interstate carriers for or on account of injuries to employes.

I.

It was necessary to remove the defective car from the train in order to make the needed repairs.

The car in question, number 125896, upon its arrival at Willmar, was immediately inspected and the inspector observed that a lifting lever of the automatic coupler was missing and that the buffer-iron was broken and that some rivets needed repairing. The inspector thereupon placed on the car two "repair track" cards. The condition of the car, as stated, required that it be removed to the repair track, number 10, for repairs.

Witness Torger Sletten's testimony reduced to narrative form: (Record pages 101-109)

> "I am car inspector for the Great Northern at Willmar and have been for about 5 years. Was engaged as such at the time of the accident or injury to the plaintiff. I recollect that injury. As car inspector, it is my duty, when a train arrives in the yards at Willmar, to look the cars over and see if they are in good running order. When the train in which car was arrived in the yards at Willmar I inspected the whole train, including that car, and found in reference to that car the pin-lifter was missing, the buffer-iron was broken, a couple of rivets in wrong kind of repair—wrong repair. The buffer-iron is an iron that protects the end of the car, the end sill, when they hit another car. When I found the condition the car was in I put a repair card on it. (Defendant's Exhibit 2.) I put two of such repair cards on the right hand side to the stepladder, about 3 feet from where the pin lifter would have been if it had been on the car. I put the

cards on the car before the accident. When a car is found in the condition I have described, and I have placed the cards on it, the car goes to the repair track. They generally got a track, an extra track, in the yard, called a bad order track. The condition of this car, when I inspected it, *was of such a nature as required it to be sent to the repair track.* I put a bad order tag on both sides of the car before the accident."

II.

THE DEFENDANT IN ERROR WAS THE REPRESENTATIVE OF THE PLAINTIFF IN ERROR IN THE PERFORMANCE OF THE PARAMOUNT DUTY RESTING UPON THE PLAINTIFF IN ERROR, AND HAD COMPLETE AND UNCONTROLLED AUTHORITY AS TO THE MANNER IN WHICH HE WOULD REMOVE THE DEFECTIVE CAR FROM THE TRAIN IN WHICH IT WAS FOUND. HE ALONE DETERMINED THE MOVEMENTS INCIDENT TO CUTTING THE CAR OUT.

Testimony of witness Paul M. Long, reduced to narrative form: (Record pages 91-100)

"I live at Willmar and hold the position of yardmaster for the Great Northern. Have been yardmaster at Willmar for a little over 4 years. I know the plaintiff Otos; knew him at the time of his injury and was at that time yardmaster at Willmar. I have supervision of the making up of trains and ordering and handling of the orders that are issued to switch-engine foremen. When a train arrives at Willmar the conductor delivers the way-bills and the lists at my office, what we call a switch-list. The bills are way-bills for the loads and the train that he brings in. One of my clerks checks these way-bills against the switch-list that he brings into the office and I deliver the switch-list to the foreman of the switch-engine. Mr. Otos was switch foreman or foreman of the switch-engine.

The duty of the car inspector, when a train arrives, is to look over the cars and ascertain whether they are

all safe to go forward out of the yard, to find what defects there are on them. When he finds a defect he places a card on the car, at each end of it, what we call a repair track card; this small green card. (Defendant's Exhibit 2.) Then the switch foreman switches this car out of the train and places it on the track, ready to be taken to the bad order track.

We have 17 tracks in our yard. In the morning I make a list out to the foreman of the switch-engine, designating on which of these tracks they will place the different cars going in different directions and for different industries. Among them tracks I designate a track where they place all bad order cars. The switch foremen in the Willmar yards generally mark all their cars with chalk marks It makes it easier for them to do their work. It gives the foremen the destination, shows them the destination on the side of the car, without looking at their switch-list all the time.

I was on duty and in service as yardmaster on the day of this injury and I handled this train in the same manner as I have described it was the custom to handle other trains. Defendant's Exhibit 3 is the switch-list which I turned over to the switch foreman, Harry Otos. The initials B. O. opposite car 125896 on this list denotes that the car opposite is bad order. That B. O. was not on the switch-list when I turned it over to Mr. Otos. When that car is in a defective condition and a bad order check mark placed opposite the car, it is the duty of the switch foreman to put the car on the track designated for bad order tracks (cars). The switch-list, Exhibit 3, was brought to my office from 30 to 45 minutes after the accident. I think it was brought by a Greek section foreman. It was then in the same condition it is in now. The letters B. O. were written on the switch-list between the time I delivered that list and the time I received it back."

Cross-examination of defendant in error, reduced to narrative form: (Record pages 52-67)

"I was working as switch foreman in the Willmar yards at the time of the accident. Had been such switch foreman from September, 1910. I went to work at 8 o'clock that morning. The yardmaster

gives us a line-up. It shows what is in the different tracks in the yards. He gives us lists of the other things, of the other work. We get that line-up every morning. The line-up shows what particular purpose certain tracks are to be used for that day. There is a track designated for a bad order track for that day. That is also indicated on the line-up. I don't remember what track was designated as a bad order track that day. Whenever a train comes into the Willmar yards there is a list made up. The conductor makes up the switch-list and this list shows the initials, number, the contents and destination of each car and the train men deliver that to the yardmaster and the yardmaster delivers it to the switchmen. When I get the switch-list I already have the morning line-up. I see from the switch-list where the cars are going and then I know what track to put each car on. I received a switch-list similar to the one I have described, after this train came in, in which the car in question was.

When I receive a switch-list I go down and start switching the train. If there is any air in the train that has just come, any air in the cars, you have to bleed them,—twist the brakes to move them, go down and cut off as many cars as you want and take out and switch. I tell the yardmaster at night where I leave all the cars that I have handled during the day and turn in my lists that I haven't finished.

During the day I find a number of defective cars and the cars that need repair. My practice was to put them on the switch-list that I put them there.

The car inspector, when the train arrives, looks it over for bad order cars and defective cars and if he finds any bad order cars bad enough so that it has to go to the repair track, he puts a repair track tag on it. If it is a light repair, probably, if he has got time to fix it he fixes it in the yard. If he finds a car with a pin-lifter gone and the brackets broken, the way they were on those and the buffer-iron out of repair, *that car would have to go to the repair track.* When I see that he has put a tag on it, a repair track tag, we have that car put on the bad order track. Defendant's Exhibit 2 is the kind of a tag the inspector puts on bad order cars. These cards are put near the ladder end on each side. Sometimes we would put chalk

marks or check marks on the cars, showing the tracks they were to go to. Sometimes cars were check marked that way and sometimes not. In case I did use these chalk marks the purpose of putting them on was so that switch-men and switch-tenders would know what place the cars should go, if I wasn't there."

Defendant in error, Otos, was the switch foreman and as such had entire charge and control of the work of breaking up the freight train and placing the cars upon the different tracks in the yard, including the placing of bad order cars upon the repair track. To enable him to do this he was given the conductor's list of cars in the train, showing the car numbers and location of the cars in the train. His admitted duty was to attach the switch-engine to this defective car 125896 and haul it from the place where he found it to the repair track, number 10, and there leave it. He did, in fact, undertake, without orders from anyone, to move, in connection with the defective car, another car which he desired to place on track number 6 before placing the defective car on the repair track.

Cross-examination of Otos: (Record page 57—et seq.)

"After that freight train arrived we got a list of the train and went down there and started bleeding the cars and went back as far as where I cut behind the car that we wanted to take out and start switching. We took them out on the line and started switching. Don't remember what track the train was on, nor how many cars were in it. We went over on to the lead and started in to place the cars and switch them by placing them on the,—by kicking them on to the track where they go. Don't remember how many cars we had hold of with the switch-engine; I should judge probably 12 to 15. At the time of the accident I was in the act of placing or kicking a car attached to car 125896. I intended to switch that car on to the Duluth track. Then I was going to put car 125896 on the

Minneapolis track, the wheat track. There was a bad order track that day. I was working with the switch-list. I can't swear whether Defendant's Exhibit 3 is the switch-list I had or not. It might be. The B. O. marked on the switch-list opposite car 125896 is a bad order mark, to indicate bad order. If this was on the switch-list it ought to go to the bad order track; according to the regular custom, that should go to the bad order track. If that was on the switch-list that is where the car ought to go. When I received the switch-list from the yardmaster there was no bad order marks on them. These bad order marks are put on by the switch-foreman that has the list, switching them. I was the switch foreman. If there were any bad order notations to be made on the switch-list I was the one to do it; I had charge of the list; I had charge of this train. If the yardmaster gave me the list he told me to go ahead, why, then, I was the boss, the man that directed all the movements of this train. The switchmen worked under my directions. I gave all the signals to the engineer, either I or the men with me. I was giving the signals at the time immediately preceding the accident. At the time I was hurt I was kicking cars. I gave the engineer the signal to kick, when I thought they were going fast enough I gave him the signal to stop and stepped in between. The cars were still moving when I went in between them. As soon as I stepped in there I felt my foot was caught. I was caught before I reached the pin. The reason I went in between the cars was that this pin-lifter which goes to the outside of the car was gone. I could have stopped the car and then gone in and pulled out the pin. There would have been no kick then. The car would have been standing still. I could have done it that way and that would have been safe. After I stopped the train I could have detached that car in perfect safety by either myself or one of my men going to the other side and lifting the pin on the other side of the other car."

Testimony of Patrick J. Conway, reduced to narrative form: (Record pages 109-112.)

"I am a switchman employed in the Great Northern yards at Willmar. Was so employed on the day of

plaintiff's injury. Mr. Otos was foreman. At the time of the accident I was at number 6 track switching, about 30 feet north from where the injury occurred. Otos was on the north side, the lead side. At the time of the accident we were working in on number 6 track, shoving those cars in there. I don't recollect the particular car referred to as 125896. I didn't make a note of the number. The car he was working on, that he got run over, that car and the next cut was going down on number 10,—6 and 10, by the line-up that I got from Mr. Otos. The next car would be going down on 10 and that would be where he was making that cut. The car where he went in to make the cut was going down on 10. The car ahead of the car that ran over him was going in on 6, the car going down on 10, where he was holding up the bad order cars. When I say 6 and 10 I refer to the number of the tracks. I know, by the line-up from the foreman holding those bad orders on to 10, we had some others previous to this time. The foreman, Mr. Otos, informed me that that car should go on 10. We were using that track 10 for holding bad orders up at that time. Otos came out on the lead with a drag of cars, he gives the helpers the line-up of where he wants those cars to go, speaks it to us, tells us. The numbers he give, the numbers that he used in giving me this line-up, he said '6 and 10'."

Testimony of witness Elmer Brogen, reduced to narrative form: (Record pages 113-115)

"I am employed by the Great Northern as a brakeman and switchman for about 3 years. Was employed as a switchman at the time of the accident, under foreman Otos, the plaintiff. My attention was attracted to the accident by hearing him holler. I was opening the knuckles on the cut that was made ahead of this one. These cars that he was working on then were being switched out to different tracks. There was a car there in that train at that time that was in a defective condition. It was on the lead, the one we was switching with. Mr. Otos informed me of its condition. He gave us instructions as to what was to be done with these cars, at this time with this particular

car. Track number 10 was used for a bad order track. My duty was to line up the switches for the different tracks. The instructions Otos gave me just before the accident were to line up the tracks 8, 6 and 10. I noticed a repair track card on this car that was going in on track number 10. Don't just remember whether it was down in the yard at the time we was making the cut of these cars, or whether it was on the lead. I don't believe it was after Otos was hurt. It was on the north side of the car where I noticed it. We were working on the north side. I was working under Otos and subject to his directions at this time. I will swear that I recollect that this car that Harry Otos was injured on was going on track 10. That was the line-up we got from the foreman."

If it be true, as contended by counsel for defendant in error, that the record does not show that at the time of the accident the defective car was actually being removed from the train to the repair track, but merely shows an *intention* on the part of the company to have it so removed and placed, it is to be observed that the company necessarily relied upon the defendant in error, as its switch foreman, *to put that intention into effect,* and had no reason to suppose that he would fail or neglect to properly perform that duty; or that in the course of performing it he would unnecessarily and without orders or instructions, attempt to move the defective car from place to place in connection with the switching of other cars to other tracks; or that he would, in disobedience of an imperative rule, attempt to uncouple the defective car while in motion. Defendant in error alone had it in his power to carry out the lawful intention of the company in the premises, from the time the car was marked for the repair track up to the time it was placed thereon to receive repairs. It has not been, nor can it be, claimed that

there existed the slightest obstacle to hinder or prevent him from uncoupling the defective car where he first found it in the train, and hauling it thence directly to the repair track. Because he did not do so, but chose another and more dangerous way, without his employer's knowledge, he sustained the injury complained of.

If, as we contend, the company has the right, without incurring liability under the Safety Appliance Act, to move a defective car from a train in the yard to an adjacent repair track for purposes of repair, it necessarily follows that the same right and immunity exist as to a switch foreman having sole charge and discretion in making the movement, notwithstanding a partial or entire failure of the movement be brought about by the unauthorized conduct of the switch foreman himself.

The only reason we cannot show an actual movement of the defective car from the train track directly to the repair track, separate from any other switching operation, as intended, is *that the defendant in error failed in his duty and so prevented that necessary movement from being made.* He alone, and not the company, stands between the lawful intention and its lawful accomplishment.

III.

SECTIONS 4 AND 5 OF THE ACT OF APRIL 14, 1910, RELIEVE FROM THE STRINGENT PENAL PROVISIONS OF THE SAFETY APPLIANCE ACT WITHOUT INCREASING THE LIABILITY OF CARRIERS FOR OR ON ACCOUNT OF INJURIES TO EMPLOYES.

Section 2 of the Act of 1893 provides:

> "That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any

such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically," etc.

Section 4 of the Act of 1910 provides:

"That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line any car subject to the requirements of this Act not equipped as provided in this Act shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended, * * * Provided, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its *line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired,* without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three, as amended, * * * if such movement is necessary to make such repairs and such repairs cannot be made except at such *repair point;* and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; * * *." (Italics ours.)

Section 5 provides:

"That except that, within the limits specified in the preceding section of this Act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, noth-

> ing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended," etc.

Counsel for defendant in error appear to contend that the proviso contained in Section 4 above, while relieving from the penal provisions of the Act of 1893, imposes new burdens upon the carriers with respect to liability for injuries sustained by employes. On page 20 of their brief, counsel say:

> "The amendment of 1910 was passed so as to prevent the defense which counsel here seek to set up," etc.

Again, on page 18, counsel say:

> "The contention that the car would not be subject to the act while being taken to the repair track, even if sustained by the record, *in view of the above amendment* is without merit."

To the same effect is counsel's argument on pages 28 and 29. The only justifiable deduction from the above is that counsel are of the opinion that the proposition of law which the defendant in error here contends for would have been a good defense in the case at bar had plaintiff sustained his injury prior to the passage of the Act of 1910.

If this be not a justifiable deduction, why the insistence by counsel that the law of 1910 was passed for the purpose of precluding the defense here made, and why the argument that the 1910 Act has any bearing? The effort of counsel to make it appear that the Act of 1910 has wrought a change is born of the necessity to evolve some answer to the defense herein—a defense founded upon the language of this court in the Delk case, which arose before the passage of the law of 1910.

If more than the mere reading of Sections 4 and 5 of the Act of 1910 be required, then the application thereof to the various situations that may arise thereunder will be sufficient to demonstrate (a) that their sole purpose is to relieve from the stringent penal provisions of the Safety Appliance Acts and (b) that there is nothing in said sections to justify the assertion that thereby injured employes are afforded grounds of recovery which did not exist prior to their enactment. Surely it will not be suggested that if a carrier does not avail itself of the privilege afforded by the Act of 1910, but, at a place short of a repair point, where it discovers a defective car, removes said car from its train, it incurs any greater or different liability for injuries suffered by employes when and while engaged in removing said defective car from the train than it would have incurred under the same circumstances prior to the passage of the 1910 law. To uphold such a contention would be to impose upon a carrier which did not avail itself of the privilege afforded by the law of 1910 the burden (greater liability for injuries) which it is alleged is imposed by said law and which it is further alleged is a condition attached to the acceptance of the privilege afforded by said law. Stated in another way, prior to the passage of the 1910 Act the paramount duty resting on a carrier upon the discovery of a defective car at any point, whether a repair point or not, was to cease hauling the car—to remove it from service. Such is likewise the paramount duty of a carrier today unless it desires to avail itself of the privilege afforded by Sections 4 and 5 of the Act of 1910, when it discovers a defective car in its train at a point other than at a repair point. If the carrier does not see fit to avail itself of the privilege afforded by

said sections, it can do as it did prior to their enactment —make the necessary movements to cut the car from the train at a point short of a repair point—and in doing the acts necessary to remove the car from service it incurs no different or greater liability for injuries to its employes than it would have incurred in making a like movement prior to 1910. Stated in still another way, prior to the passage of the 1910 law a carrier was bound to remove a car from service when discovered to be defective (unless it could be repaired without removing the same from sercice), no matter whether the defect was discovered at a repair point or at a point short of a repair point. Under such circumstances, we contend that non-negligent necessary acts done in order to remove such a defective car could not be the basis of a tort or wrong or a ground of recovery by an employe for injuries sustained. Since the passage of the law of 1910 there is likewise a paramount duty resting upon the carrier, upon the discovery of a defective car at a repair or other point, to withdraw it from service, and it incurs no greater obligations for and on account of non-negligent necessary acts done in the performance of this duty than it incurred prior to the passage of the 1910 law.

Sections 4 and 5 of the Act of 1910 have no application to the case at bar. Said sections have application only to cases where the car has "become defective or insecure while such car was being used by such carrier upon its line," at some point other than at a "repair point", and where the necessary repairs thereto could not be made "except at such repair point." Under such circumstances the movement of the car can be continued "to the nearest available repair point." In the case at bar the car, when

discovered defective, was at Willmar, a divisional terminal and a "repair point." The plaintiff in error did not have recourse to the privilege afforded by Sections 4 and 5 of the law of 1910. It did not, after discovery of a defective car at a place other than a repair point, continue its movement to a repair point. "Repair point" does not mean a particular track or shop on or in which a car may be placed at a "repair point." Suppose a defective car is in need of such repairs as to require that it be placed on repair track A for a certain repair, on repair track B for another repair, and in the car shop for still other repairs. Suppose the defective car could be taken from track A to track B and from thence to the shop in the course of its repairs without unloading therefrom an interstate shipment. Suppose further that in the course of these movements an employe should suffer injuries because of the defective condition of the car, would the movement of the car from track A to track B and from thence to the shop, in the course of repair, be a movement or hauling of said car in interstate commerce contrary to the Safety Appliance Acts?

We confidently submit:

(a) That the record in this case as quoted herein conclusively corroborates the statement of facts contained in our principal brief, and shows:

(1) That defendant in error suffered his injuries during the movement of the defective car in question for the purpose of withdrawing said car from further service until repaired;

(2) That it was necessary to withdraw said car from the train in which it was found in order to make the needed repairs thereon;

(3) That the defendant in error, as foreman, was in complete charge of the switching crew engaged in breaking up the train containing the defective car, and that he himself determined what movements he would make in order to remove said defective car from the train to the repair track; that he determined when, where and how he would separate the defective car from the cars to which it was attached for the purpose of placing it upon the repair track;

(b) That the paramount duty resting upon the plaintiff in error, upon the discovery of the defective condition of the car at Willmar, a repair point, was to withdraw said car from service until the needed repairs could be made thereon:

(c) That the rights, obligations and duties resting upon the plaintiff in error in the making of the necessary movements to withdraw the defective car in question from service were and are no different from what they were under similar circumstances prior to the passage of the law of 1910.

Respectfully submitted,

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M. L. COUNTRYMAN
and
A. L. JANES,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1915.

No. 429.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

H. W. OTOS,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF OF DEFENDANT IN ERROR.

PRELIMINARY STATEMENT.

This is a personal injury action based on the Employer's Liability Law. The case was tried in the District Court of Yellow Medicine County, Minnesota.

The jury returned a verdict in favor of plaintiff; the defendant appealed and there was an affirmance by the Supreme Court of the State of Minnesota. The case is reported as Otos vs. Great Northern Railway Company, 128 Minn. 283, 150 N. W. 922.

A Writ of Error was sued out to this Court and the case appeared in the October Term of this Court as No. 922. A motion to Dismiss, Affirm or Transfer for Hearing to the Summary Docket was duly made and came on before the Court on the 24th day of May, 1915.

This Court granted the motion to place the case on the Summary Docket, but the motion to Dismiss or Affirm was not at said time decided. As we understand the ruling of the Court, the Motion to Dismiss or Affirm will be decided at the call of the case on the Summary Docket, and should such motion be denied then the case will be heard on the merits, at that time.

At the time the Motion to Dismiss was made the Record had not yet been printed. The Court will notice that the Defendant in Error printed, to sustain his statement of facts, the decision of the Supreme Court of the State of Minnesota.

Thereafter the Plaintiff in Error filed a Brief in opposition to the motion. In that Brief the Plaintiff in Error set up what it contended were the actual and true facts in the case.

There being some slight dispute as to the facts, and the Record not being printed, the Defendant in Error thereafter filed a Reply Brief in which, for the purpose of the Motion to Dismiss, and for that purpose only, Defendant in Error conceded the facts as

set forth in the Brief of the Plaintiff in Error.

Now that the Record has been printed, however, we desire to place the actual facts before the Court as they appear from the printed Record.

Counsel for Plaintiff in Error inaccurately stated the facts in their Brief on the Motion to Dismiss, and, while we conceded their statement to be correct, for the purpose of the Motion, when the cause is heard on the merits we rely upon the facts as disclosed by the Printed Record.

We feel it our duty to make a further statement of the facts at this time inasmuch as a clear statement thereof, based on the Record, will, without doubt, convince this Court that there is no merit in the contention of the Plaintiff in Error in this case.

CONTENTION OF PLAINTIFF IN ERROR.

The only question raised by the Plaintiff in Error which was urged in their Brief in opposition to the Motion to Dismiss, was that the employee, Otos, was not engaged in Interstate Commerce at the time he was injured.

CONTENTION OF DEFENDANT IN ERROR.

Defendant in Error contends that the question of Interstate Commerce is plain, that Otos was engaged in Interstate Commerce within the well settled rules laid down by this Court.

FACTS IN THE CASE.

INTERSTATE COMMERCE.

Before taking any evidence upon the trial of this case below, the following Stipulation was entered into;

It is stipulated that car number 125896, being the car upon which plaintiff was working at the time of his injury, was a car loaded with wheat, delivered to the defendant company at **Willow Lake,** SOUTH DAKOTA, to be transported by it OUT OF SAID STATE OF SOUTH DAKOTA, and **into and through the** STATE OF MINNESOTA, and that IT WAS HAULED BY DEFENDANT IN INTERSTATE COMMERCE from Willow Lake, South Dakota, to Willmar, Minnesota, where it arrived shortly previous to the time of the Plaintiff's injury. The foregoing fact is not disputed.

It is further stipulated that said car upon which plaintiff was working was consigned from Willow Lake, South Dakota, to the City of Minneapolis, Minnesota.

It is further stipulated that SAID CAR ON THE FOLLOWING DAY, AFTER THE ACCIDENT, WAS TAKEN BY SAID DEFENDANT COMPANY FROM WILLMAR TO THE CITY OF MINNEAPOLIS, its point of destination.

Mr. James: I presume that is correct, if I find that it is not, or if it wasn't the next day, we will offer to show what the fact is. But I think that is true.

I don't presume that there is any doubt at all but what these tracks at Willmar were used for switch-

ing with cars loaded with Interstate Commerce and Intra-State Commerce, that the tracks were so used; there can't be any doubt about that.

Mr. Davis: Including the track upon which the Plaintiff was injured?

Mr. Janes: I suppose there can be no doubt about that."

(Record Pages 5 and 6).

CAR LOADED WITH INTERSTATE COMMERCE

From the Record it is undisputed that the CAR IN QUESTION WAS LOADED WITH INTERSTATE COMMERCE.

The contention of the Plaintiff in Error is that there was an INTENTION to later switch the car to a repair track, and that because of this INTENTION the car was not engaged in Interstate Commerce.

DEFECTIVE CAR COUPLED TO OTHER CARS

At the trial it was not disputed that the car was being switched while coupled to other cars in the yards at Willmar, and **was not being hauled to a repair track at the time of the injury.**

But the Plaintiff in Error claims there was a FUTURE INTENTION to place the car upon the repair track for repairs, and that hence it was withdrawn from Interstate Commerce.

While this contention is frivolous in the extreme, we wish to carefully give the Court the testimony bearing on the question, as we feel that a mere statement of the facts here will convince this Court that the Writ of Error in this case is without merit and was taken solely for the purpose of delay.

DEFECTIVE COUPLER ADMITTED

At the trial there was no controversy relative to the defective coupler. That the coupler was in fact not such as required by the Safety Appliance Act was conceded.

"Mr. Janes: We will admit that the pin-lifter was missing at the time of the accident." (Record Page 8).

The car with the defective coupling apparatus was on a so-called lead track from which several branch or switch tracks ran in an Easterly and Westerly direction. (Record Page 58).

It was stipulated that these side tracks were used indiscriminately for inter-state and intra-state commerce. (Record Page 6).

WORK BEING DONE AT TIME OF ACCIDENT

As to the exact work being done at the time Defendant in Error was injured, we quote his testimony:

"*Q.* On the 11th day of September,

1912, were you doing switching operations in that yard?

A. Yes, sir, I was.

Q. And did you have occasion to switch car known as 125896, Great Northern car? (The car with the missing pin lifter).

A. Yes, sir, I did.

Q. I will ask you, on the day in question if car 125896 was OR WAS NOT CONNECTED WITH OTHER CARS?

A. YES, IT WAS CONNECTED WITH OTHER CARS.

Q. What other cars?

A. IT WAS CONNECTED WITH A CAR OF GRAIN FOR DULUTH.

Q. And this car 125896 was bound for Minneapolis? From Willow Lake?" (South Dakota).

Mr. Janes: That was stipulated, too.

A. Yes, it was.

Q. Mr. Otos, what were you doing with those cars at the time that you were hurt, tell the jury?

A. Why, we were switching them unto

the different tracks, where they were to be placed TO GO OUT ON THE DIFFERENT DIVISIONS OUT OF WILLMAR.

Q. A car bound for Duluth would go on the Duluth track?

A. Yes, sir.

Q. A car bound for Minneapolis on the Minneapolis track?

A. Yes, sir.

Q. WHAT WERE YOU DOING AT THE TIME OF THE INJURY?

A. WHY, I WAS TRYING TO SWITCH THIS CAR THAT WAS CONNECTED TO THIS ONE THAT YOU SPEAK OF, (125896) TO THE DULUTH TRACK, A CAR OF GRAIN FOR DULUTH.

Q. What did you do?

A. Well, sir——

Q. What did you do when you were trying to switch those cars, what act did you perform?

A. TRYING TO UNCOUPLE THEM.

Q. Did you notice anything with reference to car 125896 as to its equipment, anything, missing?

A. YES, SIR, THE PIN PULLER WAS GONE.

Q. The pin-lifter?

A. Yes, the pin-lifter was gone.

Q. When you uncoupled this car 125896 from the Duluth car, as I understand?

A. Yes, sir.

Q. Did you proceed to uncouple them? Or try to?

A. I tried to uncouple them.

Q. Tell the jury what you did?

A. Why, I stepped in between to uncouple them.

Q. Tell the jury what you did?

A. Why, I stepped in between the cars to pull the pin, and my foot was caught in the guard rail." (Record Pages 29-30).

We especially call the attention of the Court to the question "WHAT WERE YOU DOING AT THE TIME OF THE INJURY?" and the answer thereto, "WHY, I WAS TRYING TO SWITCH THIS CAR THAT WAS CONNECTED TO THIS ONE THAT YOU SPEAK OF, TO THE DULUTH TRACK, A CAR OF GRAIN FOR DULUTH."

On cross-examination Mr. Otos testified as follows:

"*Q.* At the time OF THE ACCIDENT YOU WERE IN THE ACT OF PLACING OR KICKING A CAR ATTACHED TO THIS PARTICULAR CAR were you?

A. Yes, sir.

Q. And where were you going to put that car?

Mr. Davis: Might not the record show that what you mean by this particular car? By the "particular car" you mean the one that had the pin-lifter gone?

Mr. Johnson: Yes, car 125896.

Q. And what were you doing with the end car of your train?

A. You mean the car——?

Q. The car furthest west?

A. That was attached to this you one spoke of.

Q. Well, the one furthest west of the whole train?

A. I WAS TRYING TO SWITCH THEM ONTO THE DULUTH TRACK.

Q. What was the number of the Duluth track that day?

A. I don't remember.

Q. After you had placed this Duluth car,——was it, that you were in the act of switching——?

A. Yes.

Q. WHAT WERE YOU GOING TO DO WITH CAR 125896?

A. I WAS TO PUT THAT ON THE WHEAT TRACK.

Q. ON WHAT TRACK DID YOU SAY?

A. THAT WAS A CAR BILLED FOR MINNEAPOLIS, AND I WAS TO PUT THAT ON THE MINNEAPOLIS TRACK, THE WHEAT TRACK." (Record Page 58).

The Court will notice from the testimony that the injured employee was not trying TO SWITCH THE CAR 125896, the car with the defective coupler, at the time of the injury.

He was attempting to SWITCH THE CAR ANNEXED TO IT onto the Duluth track, and his after intention was, as he says "to switch that car, 125896, onto the Minneapolis track, the wheat track."

As to this car containing the so-called Duluth load, it was stipulated upon the trial that a car consigned to Duluth, from Willmar, Minnesota, passed through the City of West Superior, in the State of Wisconsin, enroute, before reaching its destination in the City of Duluth.

THERE IS NO TESTIMONY IN THIS CASE

SHOWING THAT THE DEFECTIVE CAR WAS BEING SWITCHED TO THE REPAIR TRACK. It was not being so switched at the time of the injury, but the so-called Duluth load, annexed to the defective car, was being switched to the Duluth track.

While we realize that under the law a liability would exist whether the defective car was being switched to the repair track or not we wish to make plain the fact that it was NOT being switched to the repair track at the time of the injury.

CAR NOT ON REPAIR TRACK

The defective car was attached to a car which was being switched onto the Duluth track at the time the accident happened. The accident happened while the car was on one of the switch tracks of defendant which was used in Interstate Commerce, and not while it was on a repair track.

We have carefully gone over the testimony of the witnesses for Plaintiff in Error and this testimony in no way contradicts the statement of Defendant in Error that he was attempting to SWITCH THE DULUTH CAR, which was annexed to the defective car, at the time of the injury.

There is evidence to show an after intent to run one of the cars onto track 10. There is also some evidence tending to show that this track 10 was, at times, used as a repair track. This evidence as to switching car 125896 relates to what was GOING TO BE DONE AFTER THE DULUTH CAR HAD BEEN SWITCHED ONTO THE TRACK KNOWN AS THE DULUTH TRACK.

SUMMARY OF FACTS.

To summarize the facts, we have:

An INTERSTATE RAILROAD.

A CAR LOADED WITH INTERSTATE COMMERCE, ENROUTE BUT NOT arrived at its destination.

This interstate car attached to another interstate car, the so-called Duluth load.

The employee, Otos, an interstate employee.

While trying to switch the Duluth car onto its proper track it became necessary to work the lifting lever of the coupling apparatus on the car consigned from Willow Lake, South Dakota, to Minneapolis, Minnesota.

The coupling apparatus was admittedly defective.

While attempting to uncouple the Duluth car from the car with the defective coupler the employee is injured.

The defective car was on a track used for interstate commerce, within the stipulation of counsel.

The injury did not occur while the car was on a repair track, nor while the defective car was being switched or hauled to the repair track.

The defective car was used as an instrumentality to assist in switching or "kicking" the Duluth car onto the Duluth track. (Record 58).

THE CAR WAS NOT ON THE SIDE TRACK, OR A REPAIR TRACK AT THE TIME OF THE INJURY, BUT WAS ANNEXED TO THE DULUTH CAR WHILE THE DULUTH CAR WAS BEING SWITCHED ONTO ITS PROPER TRACK.

The car was never taken to the repair track or repaired so far as disclosed by the Record.

ARGUMENTS, POINTS AND AUTHORITIES.

As to the merit or lack of merit of the questions raised by Plaintiff in Error we have gone into the questions involved quite thoroughly in the Brief on the Motion to Dismiss, Affirm or Transfer to the Summary Docket, and while there are no difficult propositions of Law confronting the Court, we believe a further statement of our position may be of some assistance to this Court.

Since we submitted the Brief on the Motion to Dismiss, this Court decided the case of St. Louis & San Francisco Railroad Company vs. Conarty, 35 Sup. Ct. Rep. 785, U. S. Adv. Ops. 1914, Page 785, decided June 14, 1915.

INTERSTATE COMMERCE.

CAR ON SIDE TRACK.

We would call the attention of the Court to the facts in the case above cited as stated by Mr. Justice Van Devanter:

"THE CAR WAS ABOUT TO BE PLACED

ON AN ISOLATED TRACK FOR REPAIR."

Justice Van Devanter further says:

"The car was loaded with freight moving from one state to another, the RAILROAD COMPANY WAS ENGAGED IN INTERSTATE COMMERCE, AND THE DECEASED WAS EMPLOYED THEREIN AT THE TIME."

The Conarty case above answers the contention of Plaintiff in Error that there could be no liability if the car was ABOUT TO BE PLACED ON A REPAIR TRACK.

The Safety Appliance Act, being the Act of March 2nd, 1893, as amended by the Act of March 2nd, 1903, provides that it shall be unlawful "to HAUL or permit to be HAULED, OR MOVED, on its line," any car with a defective coupler.

> The application of the Safety Appliance Act is plain and, under the cases of Delk vs. St. Louis & S. F. Ry Co., 31 Sup. Ct. Rep. 617, 220 U. S. 589, 55 L. ed. 590, Johnson vs. Southern Ry Co., 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, Chicago, M. & St. P. Ry Co. vs. Voelker, 129 Fed. 522, 65 C. C. A. 226, and Pederson vs. Deleware L. & W. R. Co., 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, and all subsequent cases, including the Conarty case, supra, the Defendant in Error was engaged in Interstate Commerce.

The Court will note that the Safety Appliance Act makes it unlawful to "haul" or "permit to be

hauled or moved" any car with a defective coupler.

In this case the Great Northern Railroad Company did haul and did permit to be hauled and moved the car with the defective coupler. This car was "used on its line" while in its defective condition. That the Safety Appllance Act applies to "all cars and similar vehicles USED on any railroad engaged in interstate commerce" has been decided by this Court in the Johnson case, supra, and in the Schlemmer case, 205 U. S. 1, 27 Sup. Ct. Rep. 407, 51 L. ed. 681, Southern Ry Co., vs. U. S. 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2.

Several statements are made in the Brief of the Plaintiff in Error on the Motion to Dismiss, which statements are not borne out by the Record and are incorrect.

On pages 7 and 8 of the Brief, Counsel state, relative to the movement of the car with the defective coupler: "We cannot conceive that it is liable for injuries sustained by an employee in the movement of the same car to the repair track for the sole purpose of making the repair."

We, very respectfully, ask Counsel to cite to this Court the Folio and page of the Record wherein this statement is sustained by the evidence, wherein it is shown that this car was moved, for the SOLE PURPOSE OF MAKING THE REPAIR.

The statement made is not a correct statement of the evidence and there is nothing in the record to show that the car was being moved "for the sole PURPOSE of making the repair."

We especially call the Court's attention, in view of the statement of counsel for Plaintiff in Error that the car was being moved "for the sole purpose of mak-

ing repairs" to the fact that no REPAIR WAS EVER MADE ON THE CAR IN QUESTION as far as the record shows and that ON THE DAY AFTER THE ACCIDENT THE CAR CONTINUED ON ITS JOURNEY, the record not showing that any repair was ever made thereto.

"IT IS FURTHER STIPULATED THAT SAID CAR, ON THE FOLLOWING DAY AFTER THE ACCIDENT, WAS TAKEN BY SAID DEFENDANT COMPANY FROM WILLMAR TO THE CITY OF MINNEAPOLIS, ITS POINT OF DESTINATION." (Record Page 6.)

And the Record does not show that this car was repaired before completing its journey to Minneapolis.

Further, on page 8 of the same Brief, Counsel states: "A movement of the car for the purpose of the repair of the car is not a movement of the car for the purpose of moving the traffic in the car." There is no evidence, as above stated, that the movement of the car was for the "purpose of repair."

Even if there were such evidence the statement above quoted, as an abstract proposition of law, is incorrect.

On page 9, we find this startling statement: "This Writ of Error was sued out because we conceive that neither the decision of the Supreme Court of Minnesota in this case, nor the decision of this Court in the Delk case holds that a railroad company performing its paramount duty to withdraw a defective car from interstate commerce for the purpose of repair is, while so withdrawing the car, liable for injuries to the employee on the ground that it has breached a duty in making the movement."

As to the statement above quoted relative to "paramount duty" of the railroad company, it occurs to us that a railroad company cannot, by claiming a "paramount duty" violate the plain provisions of the Safety Appliance Act.

If the claim or contention of "paramount duty" permits the hauling of a car in violation of the statute then this "paramount duty" supercedes the statute. The contention is too illogical to be worthy of serious consideration by this Court.

We again call the attention of the Court to the Act of April 14, 1910, Chap. 160, 36 Stat. L. 299, Fed. Stat. Annot. 1912, Sup. Page 335-337, which was referred to in our Reply Brief on the Motion to Dismiss

As this Court is well aware, while a car, under this Amendment, may be moved to a repair track without subjecting the Company to the **penalty** provided by the Act, such movement is "at the SOLE RISK OF THE CARRIER and nothing in this statute shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee, caused to such employee BY REASON OF OR IN CONNECTION WITH THE MOVEMENT OR HAULING of such car with equipment which is defective or insecure."

The contention that the car would not be subject to the Act while being taken to the repair track, even if sustained by the Record, in view of the above Amendment, is without merit. As stated by Doherty in his excellent work on "The Liability of Railroads to Interstate Employees," page 299:

"Least of all is there any foundation for the claim that when the lack of compliance is so clear and manifest that cars are being moved for the purpose of re-

pair, the railroad is then excused from liability to one who may be injured because of such lack of compliance.

"Under such circumstances the peril to the employees is greatest. His use of the car is a use by the railroad. His action in handling or operating the defective appliances is action necessary in the interests of his interstate employer and to the carrying on of its interstate business." (Doherty, Page 299).

However, as an original proposition the contention is no longer open to argument in this Court, in view of its many decisions construing the Safety Appliance Act.

Counsel contend that the question of Interstate Commerce, when a car is being withdrawn or about to be withdrawn to a repair track, is an open one. The facts from the Record are not as Counsel claim and the decisions of this Court are all contrary to this contention.

If the statute above quoted means anything Counsel cannot be serious in their contention, as stated in the quotation from Page 9 of their Brief on the Motion to Dismiss, relative to the "paramount duty" of the Company.

The statute is plain and the case of St. Louis & S. F. Ry Co., vs. Conarty, supra, certainly is decisive of this point, inasmuch as the facts in that case were that "the car was ABOUT TO BE PLACED ON AN ISOLATED TRACK FOR REPAIR"; and then this car, which was ABOUT TO BE PLACED ON AN ISOLATED TRACK FOR REPAIR, was held to be used in Interstate Commerce.

It is to be noticed that the car in the Conarty case was not being "hauled" at the time of the injury,

but still it came within the Employer's Liability Law and the injured employee was engaged in Interstate Commerce.

We especially call to the attention of this Court the statement made on Page 11 of the Brief on the Motion to Dismiss, wherein Counsel quote from the Delk case, the following: "It then became the duty of the Railway Company to withdraw the car from use, and have it repaired to have it conform with the law before using it further. It did not do this but continued to use the car in its defective condition. It could only do this under the penalty of the law. The car was defective; liable at any time to cause an accident and it could not be kept in use at the constant risk of a serious accident."

All through the Brief on the Motion to Dismiss counsel for Plaintiff in Error lose track of the fact that THERE IS A LIABILITY WHILE THE CAR IS BEING REMOVED TO THE REPAIR TRACK, UNDER THE AMENDED STATUTE.

The Amendment of 1910 was passed so as to prevent the defense which counsel here seek to set up, and we cannot believe that counsel, after reading that statute, can, in good faith, contend that there is no liability in this case and that the car in question was not engaged in Interstate Commerce.

This one question of Interstate Commerce is the only question argued in the Brief of Plaintiff in Error on the Motion to Dismiss.

However, the assignments of Error of Appellant are numerous and many and show the further frivolousness of their contentions on this Writ of Error.

That this Court disapproves the practice of filing

a large number of Assignments of Error is, of course, well settled and where these Assignments of Error relate to no construction of the Federal Statute, they cannot be considered and the practice of filing them is disapproved by the Court.

Central Vermont Railway Company vs. White, 35 Sup. Ct. Rep. 865, U. S. Adv. Ops. 1914, Page 865, decided June 21st, 1915.

EXCESSIVENESS OF VERDICT.

Error is assigned that the verdict in this case is excessive. This presents no Federal question and counsel cannot seriously so contend.

See Southern Railway Company, Caroline Division, vs. Bennett, 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566.

Texas & C. R. Co. vs. Hill, 35 Sup. Ct. Rep. 575, U. S. Adv. Op. 1914, Page 575, Decided April 12, 1915.

FRIVOLOUS WRIT OF ERROR.

As to the question of Interstate Commerce, that has been so decisively and "conclusively foreclosed by previous decisions of this Court, as to leave no room for doubt as to the wholly unsubstantial and frivolous character thereof." The words quoted are taken from the case of Brolan vs. United States, 35 Sup. Ct. Rep. 285, U. S. Adv. Op. 1914, Page 285, Decided February 23, 1915.

DAMAGES FOR DELAY.

The Defendant in Error very earnestly contends that the facts herein show that this Writ of Error was sued solely for the purpose of delay, and under Rule 23 of this Court, a penalty of ten per cent. should be assessed against the Railroad Company.

Counsel may say that this would be a severe penalty. The penalty must be a substantial one to act as a deterring influence in these cases in the future. The amount of the judgment in this case is Thirty-Two Thousand Five Hundred and Seventy-One and Seventy-Three One Hundredths Dollars ($32,571.73) and a penalty of ten per cent. should be assessed against this Plaintiff in Error.

COUNSEL FOR THE RAILROAD COMPANY SEEM TO BE SO OBSESSED WITH THE IDEA THAT DELAY IN LITIGATION IS ADVANTAGEOUS TO THEM, AND IT DOUBTLESS IS, THAT THEY ATTEMPT TO AND DO CARRY LAWSUITS TO THE HIGHEST COURTS UPON THE SLIGHTEST PRETEXTS.

Since the Employer's Liability Law has gone into effect and since the decisions of this Court holding that actions thereunder present some Federal question sufficient to give the Supreme Court jurisdiction, there have been many Writs of Error sued out to the Supreme Court of the United States. A large number of cases are now in this Court under that law and many more on the way.

The law does not favor delay in litigation. This is, of course, uncontrovertible and the question of delay in litigation has been taken up several times by the American Bar Association and many of its

members, including Ex-President William Howard Taft, have been endeavoring to find some way to prevent the expensive delays which are now possible under our system.

In the present case H. W. Otos was injured on the 11th day of September, 1912, more than three years ago. His case was fairly tried in the District Court of the State, and all questions taken to the Supreme Court of the State, and all questions thoroughly and fully presented there, and thoroughly and fully decided there, and it was decided, by the unanimous decision of the Minnesota Court, that the Railroad Company had no cause for complaint.

As to the question of Interstate Commerce, the only question argued in the Brief of Plaintiff in Error on the Motion to Dismiss, the Minnesota Supreme Court said: "CLEARLY THE DEFECTIVE CAR WAS IN TRANSIT AND WAS BEING USED IN INTERSTATE COMMERCE. THE FEDERAL DECISIONS leave no doubt upon this point." (Record page 199).

The law is plain, a mere reading of the statute showing that there is no right of the railroad company in this case which has been violated.

However, the idea of keeping the Defendant in Error "out of his money" seems uppermost in the minds of this railroad company and that is the sole reason for this Appeal.

If an example be not made, and if a penalty be not assessed in these cases, this Court will soon be swamped with frivolous appeals under the Employer's Liability Law.

It is safe to say that approximately ninety per

cent. of all employees of interstate railroads come within the Employer's Liability Law, and are engaged in Interstate Commerce.

Cases are arising under this law and suits are begun in every state in the Union practically every day and if this Court is to take jurisdiction of all cases arising under this law and permit Writs of Error in all these cases where the questions are as trifling and frivolous as they are in this case, then the Docket of this Court will be clogged with Writs of Error under the Employer's Liability Law and little time will be left for serious business of the Court.

If a penalty be assessed in this case it will act as a deterrent to Railroad companies and in the future Writs of Error will not be so hastily sued out, with the resulting delay, unless there be really some meritorious Federal question to be determined.

If the sole penalty the railroad company pays for delaying the payment of the judgment be the rate of interest which they must pay on that judgment, then it is always an adtvanage to the company to sue out Writs of Error and delay the payment of the judgment as long as possible.

The money due the Defendant in Error here is kept from him by the railroad company, who can make a bigger percentage thereon than they are obliged to pay for the delay here incurred, and if the only penalty to them is the ordinary rate of interest on the judgment then there is no hindrance to a continuation of such frivolous Writs of Error.

The Employer's Liability Law, at the time of its passage, was intended to be a boon and a help to the employee and the laboring man working on Interstate Railroads, or Railroads Engaged in Interstate Commerce.

IF, IN EVERY ACTION BROUGHT UNDER THAT LAW, A WRIT OF ERROR CAN BE SUED OUT TO THE SUPREME COURT OF THE UNITED STATES, THEN THE STATUTE IS A BANE INSTEAD OF A BLESSING.

The ordinary delays incident to a trial in District Court, and an Appeal and a Hearing in the State Supreme Court are vexatious and costly enough, but if to these are to be added the delays and expense incident to suing out a Writ of Error to the Supreme Court of the United States, on the slightest pretext, on the most frivolous question, then it were better for the employees that no Employer's Liability Law were ever passed.

SMALL LITIGANTS CANNOT STAND THE EXPENSE OF BEING HAULED INTO THE SUPREME COURT OF THE UNITED STATES AND IT SEEMS TO US THAT THE SUPREME COURT OF THE UNITED STATES SHOULD TAKE SOME STEPS TO STOP WRITS OF ERROR IN CASES OF THIS KIND.

It occurs to us that a penalty of ten per cent. of the amount of the judgment, assessed in a few of these cases, will have a wholesome effect upon railroad companies and their counsel; that it will prevent them from taking up the time of this Court with frivolous questions.

It is a matter of common knowledge that counsel for railroad companies appeal their cases and delay the payment of judgments so that they may say to men who are injured in the future: "Look at Mr. Blank; he sued us and it took him four years before he got his money and then he had to pay out most of it in expenses and attorneys fees."

Every member of this Court from his own experience knows that this statement is substantially true. There is a crying need that something be done to stop this pernicious practice.

THE IDEA THAT EVERY LAWSUIT INVOLVING AN INJURY TO SOME INDIVIDUAL, ARISING UNDER THE EMPLOYER'S LIABILITY LAW, CAN BE CARRIED TO THE SUPREME COURT OF THE UNITED STATES, AND THE EMPLOYEE BE FORCED TO WAIT TILL THAT COURT CAN DECIDE HIS CASE, IS ABHORRENT TO THE AMERICAN SENSE OF JUSTICE.

It never was the intention of the framers of the Act that they were going to DELAY the recovery by a railroad employee and make it so that any action brought by him under the Employer's Liability Law could not be determined for three years or more.

The Employer's Liability Act is a remedial statute. This Court has so said and has said that it should be liberally construed. It was deemed to be, by Congress, more just than the common law and supplanted the common law in an attempt to give to laboring men more and greater rights than they had under the common law.

As was stated by Mr. Justice Moody in St. Louis I. M. & S. Ry Co. vs. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616: "The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just, * * * *. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burden upon those who could measurably control their cause."

That the intention of Congress was to give more and greater rights to the employee is certain. IF HE IS OBLIGED TO WAIT, AS IN THIS CASE, MORE THAN THREE YEARS FROM THE DATE OF HIS INJURY BEFORE RECEIVING COMPENSATION THEREFOR, THEN THE ACT HAS FAILED IN ITS PURPOSE.

We realize that while the Statute was new there were cases necessary to be decided, in which the law should be construed and the meaning thereof settled. But after this has been done and when Writs of Error are sued out on such palpably frivolous contentions as in this case, we earnestly ask this Court to assess a penalty of ten per cent. of the amount of the judgment, to act as a deterrent to counsel in future cases.

Cases are now being carried to the Supreme Court of the United States, under the Employer's Liability Law, which heretofore were decided by the State Supreme Courts as Courts of last resort, where the injury arose before the Employer's Liability Law went into effect and where the recovery was under the common law or under state statutes.

To sue out Writs of Error to the Supreme Court of the United States, does not mean much to Railroad Companies, and unless something is done to stop the practice, practically every litigated case will be carried to this Court, be the Federal question even more frivolous than the alleged Federal question in the case at bar, if that be possible.

If ever there was a case where damages for delay should be awarded, we contend it should be done in this action.

Should the Court dismiss the Writ of Error because the questions alleged have been so well settled

by previous decisions of the Court as to afford no basis therefor, then damages may be granted on such dismissal, on the authority of Deming vs. Carlisle Packing Company, 226 U. S. 102, 57 L. ed. 140, 33 Sup. Ct. Rep. 80.

This Court cannot but find that the "conclusion that a Writ of Error has been prosecuted for delay is the inevitable result of a finding that it has been prosecuted upon a federal ground which is unsubstantial and frivolous."

Deming vs. Carlisle Packing Company, supra.

If the unsubstantiality and frivolousness of the federal ground for the Writ of Error is a basis for assessing the penalty, then the Court should assess the penalty in this case, and in so doing the penalty should be ten per cent., so, as above stated, to act as a deterrent to corporation counsel in the future.

We believe the imposition of a penalty of ten per cent. as was done in the case of Texas & Pacific Railway Co. vs. Prator, 33 Sup. Ct. Rep. 637, 229 U. S. 177, 57 L. ed. 1139, would have a wholesome and salutary effect on Railroad Companies suing out Writs of Error on unsubstantial grounds.

Bearing on the question of whether or not the Writ of Error in this case was prosecuted in good faith we call the attention of the Court to the fact that **Counsel FOR THE RAILROAD COMPANY KNEW, PRIOR TO SUING OUT THE WRIT OF ERROR IN THIS CASE:**

1st: **THE PROVISIONS OF THE ORIGINAL SAFETY APPLIANCE ACT.**

2nd: **THE PROVISIONS OF THE AMENDMENT OF 1910.**

3rd: COUNSEL ALSO KNEW, AS THEY WERE INTERESTED IN THE QUESTION, THE FACTS AND THE DISCUSSION ANTE-DATING THE PASSAGE OF THE AMENDMENT OF 1910, TO THE SAFETY APPLIANCE ACT.

4th: Counsel knew that the Amendment of 1910 was passed AS A RESULT OF THE CONTENTION OF THE RAILROAD COMPANIES that a strict construction of the act, as declared by the Supreme Court in the Taylor case, would result in the roads being penalized when they were attempting to move cars to the repair track for the sole purpose of re-pair ing them.

Doubtless the very Counsel who are Attorneys of Record for the Plaintiff in Error in this case were interested in this legislation and watching it in behalf of the Great Northern Railroad Company.

This Counsel were aware of the report of the Committee on Interstate Commerce which was submitted to the United States Senate on February 18th, 1910, being Senate Report Number 250, Sixty-First Congress, Second Session, Page 3. In this report Senator Elkins, Chairman of the Committee, said:

"The amendment proposed permitting movement without penalty of a defective car to a repair shop, when necessary, is deemed advisable, as the Supreme Court of the United States, in the Taylor case, held that the present Act, which this Act amends and supplements, is absolute, and there is therefore great doubt as to the right of a railroad company to move even a defective car to a point of repair without incurring the penalties of the Act. **It is with no intent of relieving the carriers from the construction put upon the Act by the Courts in personal injury suits, so far as liability for injury to their em-**

ployee is concerned, that this amendment is recommended. SUCH NECESSARY MOVEMENT IS STILL TO BE AT THE RISK OF THE CARRIER, AND THE ABSOLUTE CHARACTER OF THE ACT IN ITS REMEDIAL FEATURES AS DETERMINED IN THE TAYLOR CASE IS INTENDED TO BE PRESERVED AND MAINTAINED UNDER THIS PROPOSED AMENDMENT.

"THE CARRIERS have urged this amendment to relieve them from penalties which they claim are possible under existing law, if a defective car is hauled to a repair shop, although such movement is one which must necessarily be made for the purpose of placing such car in repair.

"It is one of the perils of the operation of the railroad for which train men are not at all responsible. As it is practically obligatory upon the train men to incur such dangers, there should be no impairment of any right of such train men by reason of the performance of such dangerous duty. As the law stands to-day prohibition of the movement of such defective car seems to be absolute, and the rights of the train men in operating such a car have been declared to be absolute. In removing the penalty for the hauling of such a defective car, when necessary, to a repair shop, **it is intended by the terms of the provision to preserve intact and unimpaired all the rights now existing by law to the train man, or his representatives, to recover in case of injury or death resulting from the peril of participating in the movement of such a defective car.**

"IT IS BUT JUST THAT THE RISK OF WORKING ABOUT AND THE MOVEMENT OF DEFECTIVE EQUIPMENT SHOULD BE BORNE BY THE CARRIERS. THIS AMENDMENT DOES

NOT PERMIT THE MOVEMENT OF DAMAGED CARS IN CONNECTION WITH THOSE COMMERCIALLY USED, AND IN EVERY OTHER RESPECT THE INTERESTS OF THE EMPLOYEES HAVE BEEN FULLY SAFEGUARDED."

(Doherty, Pages 304, 305 and 306).

Bearing on the question of whether or not the penalty of ten per cent. should be assessed against the Plaintiff in Error in this case we contend that the fact that Counsel had knowledge of the law applicable to the facts in this case, of the report of the Senate Committee on Interstate Commerce, above quoted, conclusively shows that the Writ of Error in this case was not prosecuted in good faith.

For Counsel to SAY the Writ of Error is prosecuted or sued out in good faith is not sufficient. Where the facts and the law appear as they do in this case the conclusion is inevitable that the Writ of Error is sued out for the purpose of delay only.

CERTAINLY INTELLIGENT AND ASTUTE COUNSEL CANNOT SERIOUSLY CONTEND THAT THEY WERE NOT AWARE OF THE DECISIONS OF THIS COURT APPLICABLE TO THE PROPOSITION IN HAND AND THAT THEY WERE NOT AWARE OF THE HISTORY OF THE STATUTE AND AMENDMENTS AND OF THE FACTS LEADING UP TO ITS ADOPTION.

Not only are the decided cases all against the contention of the railroad company but so are all text books written on the question.

Bearing in mind that the Record does not show that the car was being moved for the purpose of repair; that it does not show that the car ever was repaired, but does show that the

car with the defective coupler, the next day continued on its journey to Minneapolis, we wish to quote the following from Doherty's "Liability of Railroads to Interstate Employees":

"If a car engaged in interstate commerce becomes defective so as to give rise to an action for any injury caused by such defect at any step of its journey on the main line or in a switching yard, how does the determination to repair it or the movement to repair it deprive the car of its interstate character?

"While such a car is in an interstate train, is being taken out of an interstate train, or is being prepared for coupling to a locomotive or is being uncoupled from a locomotive, such locomotive being generally used in interstate commmerce, or if such defective car is one generally used in interstate traffic, at no such time can the defective car be said to have lost its interstate character or to be beyond the power of control by Congress.

Such a car certainly cannot be said to have lost its interstate character while it remains loaded with any portion of its interstate traffic. If unloaded, and in the course of a journey to another State, diverted temporarily for repair, it is not deprived of its interstate character by any such temporary diversion. This can no more be true than that its interstate character is lost by any stoppage on the road. THERE IS NO PARTICULAR LOCAL SANCTITY TO A DELAY FOR REPAIR WHICH WILL MAKE SUCH DELAY OPERATIVE TO DEPRIVE A CAR OF ITS INTERSTATE CHARACTER, WHILE DURING ALL OTHER DELAYS IN TRANSIT THE INTERSTATE CHARACTER OF A JOURNEY WHICH IS UNDER WAY SHALL REMAIN."

Doherty, Liability of Railroads, etc., Pages 308-309.

From all the decided cases it is plain that the purpose of the Safety Appliance Act was to lessen the danger to Employees while COUPLING OR UNCOUPLING CARS.

As to the contention that a "future intent" to take the car to the repair track removes it from the plane of Interstate Commerce, we call the Court's attention to the very apt language of Mr. Doherty in his work on "Liability of Railroads to Interstate Employees" from which we have heretofore quoted:

"THE TRUE INTENT OF THE SAFETY APPLIANCE ACT IS NOT CARRIED OUT, THE REMEDIAL FEATURE OF THIS ACT, WHICH IS THEIR DOMINANT FEATURE, IS NOT SUSTAINED BY AN INTERPRETATION, WHICH EXCLUDES FROM LEGAL PROTECTION ANY EMPLOYEE INJURED BY A DEFECTIVE CAR AT ANY TIME UNTIL SUCH CAR IS SEGREGATED AND ISOLATED FROM ALL OTHER INTERSTATE CARS. WHEN SO ISOLATED NO NECESSITY FOR COUPLING OR UNCOUPLING EXISTS."

(Doherty, Liability of Railroads, Etc., Page 309).

"Coupling or uncoupling a car on a repair track is as dangerous as when attempted anywhere else upon a railroad. **A car is certainly in "use" when employees are called upon to couple it or uncouple it, even for repairs. While any necessity exists for coupling or uncoupling a car for any purpose on an interstate railroad such car is in "use" within the meaning of the law.** Whenever any of the purposes or uses of an interstate rail-

road require an operative automatic coupler for the safety of employees using or handling such car, the absence of such operative coupler cannot be excused."

(Doherty, Liability of Railroads, Etc., Page 310).

FROM ANY ANGLE THE MATTER MAY BE VIEWED IT APPEARS ABSOLUTE AND CONCLUSIVE THAT THE WRIT OF ERROR IN THIS CASE WAS NOT PROSECUTED IN GOOD FAITH, BUT SOLELY FOR THE PURPOSE OF DELAY.

Under the facts, as disclosed by the Record, the judgment in this case should be affirmed, with interest and costs; and a penalty of ten per cent. of the amount of the judgment should be assessed against the Plaintiff in Error.

Respectfully submitted,

SAMUAL A. ANDERSON,
Attorney of Record for
Defendant in Error,
St. Paul, Minnesota.

TOM DAVIS and
ERNEST A. MICHEL,
Both of Marshall, Minnesota,
Of Counsel.

Supreme Court, U. S.
FILED
MAY 29 1915
JAMES D. MAHER
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 429

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

H. W. OTOS,
Defendant in Error.

In Error to the Supreme Court of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR UPON MOTION TO DISMISS, ADVICE OR TRANSFER TO THE SUMMARY DOCKET.

E. C. LINDLEY,
Attorney for Plaintiff in Error.

M. L. COUNTRYMAN,
A. L. JANES,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 922.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

H. W. OTOS,
Defendant in Error.

In Error to the Supreme Court of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR UPON MOTION TO DISMISS, AFFIRM OR TRANSFER TO THE SUMMARY DOCKET.

The defendant in error obtained a verdict of $35,000.00 for injuries sustained while in the employ of the plaintiff in error as section foreman in its yards at Willmar, Min-

nesota, resulting in the amputation of his leg near the hip joint. He also claimed that his sexual powers had been destroyed by the accident.

The trial court reduced this verdict to $30,000.00 and upon appeal to the Supreme Court of Minnesota the verdict was sustained. Thereupon the case was brought to this court by writ of error, the writ being perfected March 12, 1915. The transcript for the use of this court has not yet been printed.

The facts, a knowledge of which are essential to a determination of the alternative motions made by defendant in error, are not fully or correctly stated in the decision of the Minnesota Supreme Court, nor in the brief filed by defendant in error in support of his motion. Briefly the facts are as follows: Freight car No. 125896 was loaded with wheat at Willow Lake, South Dakota, to be transported to Minneapolis, Minnesota. It was placed in a freight train at Willow Lake and hauled by plaintiff in error to Willmar, Minnesota, a division point, where the train was placed upon a track for inspection. This car was found to be defective in that the lifting lever, a part of the automatic coupling apparatus, was missing. There was also a broken buffer iron and a couple of rivets needing repairs. The inspector who discovered these defects thereupon placed two "bad order" placards, spoken of in the record as "repair cards," upon the car at opposite ends. It was necessary to place the car on the repair track. The conductor's list of cars in this train, showing their respective numbers and locations in the train, was then given by the yardmaster to the defendant in error who, as switch foreman, was in charge of the work of switching the various cars in this train to different tracks in the yard pre-

paratory to making up other trains destined for different parts of the company's railway system. The switching list picked up near the place of the accident a few minutes after he was injured bore a notation opposite car No. 125896 showing that it was a bad order car. Defendant in error as such switch foreman had full charge of every detail of the work involved. He gave orders to the engineer and to his two helper switchmen. It was the custom of the yardmaster every morning to designate a particular track to be used that day for the placing thereon of bad order cars for purposes of repair. On the day in question he had designated track No. 10 as the repair track. It was the duty of the switch foreman to place bad order cars upon that track. The car in question, No. 125896, was the seventh or eighth from the front end of the train. At the time of the accident this car, still coupled to other cars, was being taken to track No. 10. Coupled to this car at its defective end was another car which the switch foreman desired to leave on another track, No. 6, following which it was his intention to drop the defective car in on No. 10. He gave the engineer the usual back-up signal and when the cars were properly in motion he gave a stop signal and immediately stepped in between the defective car and the one to which it was coupled for the purpose of lifting the pin, the cars still being in motion. He in some way lost his balance or caught his foot in a switch point and fell, the car running over his leg.

In going between the moving cars to make the uncoupling defendant in error violated a strict rule of the company with which he was very familiar. Long prior to the accident he had received a postal card notice of the

importance of this rule and had signed an admission of its receipt. There was no evidence whatever that the rule had been habitually disregarded or disobeyed. In rebuttal defendant in error testified that it had been customary for several months previous to the accident when a pin lifter was missing to step in between the cars and pull the pin, and that the yardmaster had seen him step in between cars. He did not, however, testify that he ever before had stepped in between the cars *when they were moving.* He did testify, however, that it was not necessary for him to go between the cars at this time while moving, that he could have made the uncoupling after the cars had come to a full stop, also that he could have made it by going around to the other side of the car and using the lifting lever on the adjacent car. He had no orders from anyone to do what he did do at that time. He was, as before stated, in full charge and control of the entire operation.

Upon the trial plaintiff in error requested the trial court to charge the jury as follows:

> 1. You are instructed that if you believe from the evidence in this case that the car in question, the car with the defective coupling apparatus thereon, had been withdrawn from traffic, as claimed by the defendant, and was being moved onto the sidetrack for the sole purpose of repairs, as claimed by the defendant, then I instruct you that such car was not engaged in interstate commerce at the time the plaintiff was injured, within the meaning of the Federal Safety Appliance Act.
>
> 2. The fact that the coupling apparatus on the car in question was defective in and of itself does not justify a verdict for the plaintiff, unless you further find that such car was engaged in interstate commerce at the time of plaintiff's injury.

3. It was the legal duty of the defendant to remove the car with the defective coupling apparatus thereon from its train at Willmar for the purpose of repairs, and while solely engaged in removing said car from its train, that is, while moving said car from its main line track to its repair track, such car would not be engaged in interstate commerce.

4. The mere fact that the car in question was loaded with freight in the course of transportation from the state of South Dakota to the State of Minnesota, would not justify you in finding that such car was engaged in interstate commerce at the time the plaintiff was injured.

5. If, at the time the plaintiff was injured, he stepped between moving cars for the purpose of uncoupling said cars, he knowing that the lifting lever was missing on one of said cars, and there was a safer way to make such uncoupling, which this plaintiff knew, such fact would justify you in finding that the plaintiff was guilty of contribntory negligence. The law requires him to take reasonable precaution to avoid injury.

6. If you find that the defendant, at the time the plaintiff was injured, was not engaged in interstate commerce, and that plaintiff was guilty of contributory negligence, then your verdict must be for the defendant.

7. The so-called Federal Safety Appliance Act, that is the Act requiring all cars used in handling or moving interstate traffic to be equipped with automatic couplers while so being moved, does not apply to a car after it has been taken from an interstate train for the sole purpose of being placed upon a repair track for the purpose of repairing a defective coupling apparatus thereon.

These requests were each and all refused and proper exceptions taken. The trial court charged the jury that if plaintiff's injuries resulted from a defective coupling apparatus, defendant was liable therefor and that the de-

fenses of contributory negligence and assumption of risk were not available. The position taken by the trial court in brief was that the railway company was liable as an insurer for injuries received by its employes resulting from defective couplers, even though the defective car was being moved only for the purpose of immediately placing it upon a repair track to be repaired. Such was also the holding of the Minnesota Supreme Court. Its opinion indicates some doubt as to the actual intention to place the car in question upon the repair track, but it admits that there was evidence that such was the intention of the company before allowing the car to proceed further. It is obvious that neither the trial court nor the Supreme Court undertook to weigh the evidence or determine the fact upon that point, because in their opinion it was as a matter of law an immaterial question. The state supreme court thus stated the contention of the defense and its own decision:

> "It is conceded that defendant's road at Willmar is a highway of interstate commerce and that the traffic in which this car was engaged when in transit was interstate traffic, and that if it was in transit at this time, then, under the federal Safety Appliance Acts and the Employers' Liability Act, defendant is liable for any injury caused by the defective coupler, and neither contributory negligence nor assumption of risk constitutes any defense. The contention of defendant is that 'the condition of the car was such that it had to go to a repair track for repair,' that 'it was necessary that the through movement of the car be interrupted at Willmar for the purpose of repairs,' and that therefore, 'the defective car has been withdrawn from commerce' and 'not in the course of transit.'
>
> We are of the opinion that at the time of plaintiff's injury this defective car was in transit and was being used in interstate commerce. A car in process of

> transportation from one state to another is usually in transit and engaged in commerce from the time it is started upon its passage until the delivery of its cargo at the place of destination. United States v. Colorado & N. W. R. Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893. It is not taken out of commerce because in need of repair, nor because of a purpose to repair it, nor because of a design to set it upon a repair track in due course for that purpose. We need not consider what the situation might have been if this car had been set at rest on the repair track. This had not been done. At the time of the accident it was still part of an interstate train. Its cargo had not reached its destination and was not ready for delivery to the consignee. It was attached to and was being moved with another interstate car, from which it was in due course being uncoupled. Clearly the defective car was in transit and was being used in interstate commerce. The federal decisions leave no doubt upon this point."

It is to be observed that the Supreme Court of Minnesota says:

> "We need not consider what the situation might have been if this car had been set at rest on the repair track. This had not been done."

We respectfully submit that the question which the Supreme Court of Minnesota says it need not consider is substantially the very question which plaintiff in error was and is insisting should be considered. It is substantially the question which plaintiff in error insists is not precluded by the decision in the Delk case. If a carrier be not liable for injuries sustained by an employe in the movement of a defective car on a repair track after the car has been placed on said track for repair, which movement is made solely in the course of the repair, we cannot conceive that it is liable for injuries sustained by an employe in the movement of the same car to the repair track

for the sole purpose of making the repair. We are not quarreling with the rule which we concede this court has firmly established, viz., that there is absolute liability upon a carrier to keep its cars used in interstate commerce equipped as required by the safety appliance law *when and while using said equipment in interstate commerce.* We are asserting that when a carrier discovers that its equipment does not comply with the law there then arises a *paramount* duty on the part of the carrier to cease using said defective cars in interstate commerce and to withdraw the same from such use for the purpose of again equipping them in compliance with the law; that in the performance of said paramount duty to withdraw a defective car from use in interstate commerce it cannot be guilty of a breach of duty in doing that which the law exacts shall be done, viz., the withdrawal of the car from further use in the movement of commerce. The Supreme Court of Minnesota and counsel for defendant in error apparently misconceive what we mean when we say that the movement of the car to the repair track was not a use of the car in interstate commerce. Apparently both the court and counsel conceive that we are contending that for some reason the traffic in the car is no longer interstate commerce. Such is not our thought. The prohibition is against the use of the car to move interstate commerce. A movement of the car for the purpose of the repair of the car is not a movement of the car for the purpose of moving the traffic in the car. The use made of the car in the movement to the repair track is not a use for the movement of the traffic in the car. To illustrate: Suppose a car had been placed at rest upon the repair track, in close proximity to a lathe required for its repair; that in the

course of said repair it became necessary to make a movement of the car in order to make a proper use of the machinery required in its repair. We insist that such a movement would not be a use of that car in the movement of interstate commerce *non constat* the car be loaded with the traffic which had not as yet completed its interstate journey.

The state court regarded the decision of this court in Delk v. St. Louis & San Francisco R. R. Co., 220 U. S. 580, conclusive against the company's contention in this case. We have not been able to convince ourselves that the decision in the Delk case was intended by this court to go so far as to preclude the possibility of a defense in any case of injury to a train employe growing out of a defective safety appliance upon a car being moved, not for purposes of transportation, but solely for the purpose of placing it upon the nearest repair track for purposes of repair.

This writ of error was sued out because we conceive that neither the decision of the Supreme Court of Minnesota in this case nor the decision of this court in the Delk case holds that a railroad company performing its paramount duty to withdraw a defective car from interstate commerce for the purpose of repair is, while so withdrawing the car, liable for injuries to an employe on the ground that it has breached a duty in making the movement. Certainly the Supreme Court of Minnesota disclaims holding that a carrier is liable for injuries sustained by an employe because of defective safety appliance equipment if said injuries be sustained when and while the defective car is at rest upon a repair track. As appears from the language of the Delk case (infra, page —), this court

took particular pains to point out that the movement of the car in that case was not a movement being made solely for the purpose of placing the defective car for repair. It did not occur to us that this was a matter to be summarily disposed of upon motion to dismiss or affirm. We do join counsel for defendant in error, however, in suggesting that this cause be transferred for hearing to the summary docket of this court. The importance of the question involved, to say nothing of the fact that a judgment for $33,000.00 drawing interest is outstanding against our client, justifies us in requesting an early hearing of the cause.

On page 10 of counsel's motion to dismiss he says:

> "There was an attempt made by the railroad company in the trial court to show that the car with the missing pin lifter was being prepared for switching onto the 'repair track' for repairs at the time of the injury."

Counsel after quoting from plaintiff's testimony proceeds:

> " * * * The jury found a general verdict for the plaintiff and, presumably, found that the car with the defective coupling was not being switched to the 'repair track' for repairs, as contended by the railway company, but was being switched, as contended by Otos while coupled to a car going to the Duluth track."

Even if it be assumed that on the record (which is not before the court) the question as to whether or not the car was being switched to a repair track was for the jury, nevertheless if the proposition contended for by plaintiff in error be correct, it is not liable for a breach of the safety appliance law if the movement in question was being made

solely pursuant to the mandate of that law that the car should be removed to a repair track. The plaintiff in error was entitled to have the jury instructed as to its duties and obligations in that respect. This the state courts denied. It cannot be gainsaid that both the trial court and the Supreme Court of Minnesota proceeded upon the theory that even though the movement was being made solely for the necessary purpose of taking the defective car out of the interstate train and placing it upon a repair track, the railway company was absolutely liable for the injuries sustained by plaintiff. That the trial court so held is evidenced by the refused requested instructions. That the Supreme Court of Minnesota so held is evidenced by its language above quoted.

Indeed, if the fact as to whether or not the movement being made at the time of plaintiff's injury was for the sole purpose of taking the car out of service and placing it for repair be questioned by defendant in error, and that fact be of any controlling importance as to the law of the case, it must follow that the motion to dismiss must be denied. Clearly, if plaintiff in error be correct in its contention as to the law, and there was any evidence to go to the jury on the question as to whether or not the movement of the car in question was for the purpose of placing the car on the repair track, the trial court erred in refusing the requested instructions which were and are designed to inform the jury with respect to the duties of the railway company as those duties obtain under our contention as to the law.

We understand the rule to be that even though the transcript of record were before the court, the court would not examine the same on a motion to dismiss in order to as-

certain the state of the record as to controlling controverted facts.

Lynch v. DeBernal, 131 U. S. XCIV Appx.
Hill v. Chicago & E. R. Co., 129 U. S. 170.
Day v. Washburn, 23 How. 309.
Minor v. Tillotson, 1 How. 287.

As we understand the facts in the Delk case the car with the defective coupling apparatus had not been placed upon a repair track nor was there any intention of so placing it. The defect had been observed and a "bad order" card placed on the car, which was then standing on a team track. The intention was to obtain from the repair shop two and one-half miles distant the material for repairing the coupler on this car, but before any repairs had been made the following operations occurred:

> "The cars were on the track, extending in the general direction of east and west, the engine being on the western end of the nine cars. The nine cars were drawn off this team track onto the lead track. The eastermost two cars, being empties, were left on the lead track. The remaining seven cars were then pushed back on the team track. The eastermost two cars of the seven, loaded with brick, were left on the team track. The remaining five cars were again drawn onto the lead track, and three loaded with coal were left thereon. The engine, with the remaining two cars, again went upon the team track, and defendant in error undertook to couple the eastern end of the two cars attached to the engine to the western end of the two cars just left on the team track, but, owing to a defect in the coupler on the eastern end of the two cars attached to the engine, the coupling could not be made without a man going between the ends of the cars. The defect on car K. C., F. S. & M. 21,-696, was this: The chain connecting the uncoupling lever to the lock pin or lock block was disconnected, owing to a break in the lock pin or lock block. The

drawbar also had a lateral motion of 4 inches. Defendant in error undertook to hold the drawbar away with his foot from the side upon which he stood, so that the two couplers could couple by impact. In so doing, his foot was badly injured."

In other words this defective car being used in interstate commerce and coupled to other cars was, after discovery of the defect,—

(a) taken off the team track on to the lead track;

(b) two empty cars in the string were there cut off and left on the lead;

(c) the remaining cars were then pushed back on the team track;

(d) two cars loaded with brick were left there;

(e) the remaining five cars, including the defective car, were again drawn on to the lead, three loaded cars were left there;

(f) the engine with remaining two cars, one of which was the defective car, again went upon the team track and while these two cars were being uncoupled the injury occurred.

It is to be observed that the defendant in the Delk case contended that the car in question had been laid by for repair and hence was not being moved in interstate commerce. It is to be further observed that Mr. Justice Lurton, then a member of that court, was of the opinion that the evidence in the record justified a submission of that question to the jury. The majority of the Circuit Court of Appeals were of the opinion that upon the facts disclosed there was no question for the jury; that the car

was moving in interstate commerce; and this court upheld the majority.

> "After the coupler became defective and could not be coupled without going between the ends of the cars, it became unlawful for the railway company to haul it or to permit it to be hauled or used on its line. *It then became the duty of the railway company to withdraw the car from use and have it repaired to conform with the law before using it further.* It did not do this but continued to use the car in its defective condition. It could only do this under the penalty of the law. The car was defective, liable at any time to cause an accident, and it could not be kept in use *at the constant risk of a serious accident*, either upon the excuse that it would be inconvenient to withdraw it from the service or that the company had sent for the required appliance and would repair the car when it should be received. * * * This is a case peculiarly within the provisions of the act." (Italics ours.)
>
> "A car loaded and being used in moving interstate traffic was found with a defective coupler. The car was marked 'in bad order' and a repair piece sent for. After thus being notified of its condition the car should have been withdrawn; but it was not and the company kept on moving it about in connection with other cars and finally ordered the injured employe to couple it to another car. This he tried to do with the natural result and he has been crippled for life."

This court concurred with the majority of the Circuit Court of Appeals that the car in question was being used in interstate traffic when the plaintiff was injured.

This then is the precise holding in the Delk case: A car known to have a defective coupler is, while being moved in switching operations from one track to another in the yards, still being used in interstate traffic and the Safety Appliance Act applies to it, notwithstanding it has previously been carded as in bad order and the intention exists to repair it at some future time.

In the present case a very different state of facts is presented. A car moving in interstate traffic upon arrival at a division point is upon inspection found with a defective coupler. Thereupon the plaintiff in error, pursuant to its paramount duty as declared by the above quotation from the Delk case, prepared "to withdraw the car from use and have it repaired to conform with the law before using it further." A repair card was placed upon it. The paramount duty of the plaintiff in error can only be performed by it through its agents. The performance of the paramount duty of the plaintiff in error, to withdraw the car in question from further use, rested upon defendant in error as the switch foreman of the yard wherein the car for the first time was found to be defective. A repair card is placed upon it. The train of which it is a part is thereupon taken charge of by the switch foreman, the plaintiff in this case. His admitted duty is to take that defective car to the nearest repair track where it is to remain until repaired. He has no orders or instructions to do anything else with that car except to move it from the train to the designated repair track. His orders are strict not to attempt to uncouple it by going between the cars while moving. He signals the engineer to back up the string in which the defective car is the last car but one, and while the cars are moving towards the repair tracks he steps between the defective car and the adjoining car contrary to orders and is injured. His only reason for going between the cars at that time was to cut off from the defective car another car which he did not intend to leave on the repair track with it.

At the time of the accident the company was in good faith endeavoring to comply with the letter of the Safety

Appliance Law. It was not at that time using the car for interstate traffic but was using it for the sole purpose of completely withdrawing it from such traffic for repair purposes.

By this writ of error we have in good faith intended to present to this court the question as to whether or not a railway company is liable for injuries suffered by an employe who, upon the discovery of a defective car and with full control over its further movements, is engaged in the performance of his duty and (to quote from the above language of the court), "the duty of the railroad company to withdraw the car from use and have it repaired to conform with the law before using it further."

It is respectfully submitted that plaintiff in error is entitled to a hearing upon this important question.

E. C. LINDLEY,
Attorney for Plaintiff in Error.

M. L. COUNTRYMAN,
A. L. JANES,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No. 922.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

H. W. OTOS,
Defendant in Error.

In Error to the Supreme Court of Minnesota.

REPLY BRIEF OF DEFENDANT IN ERROR UPON MOTION TO DISMISS, AFFIRM OR TRANSFER TO THE SUMMARY DOCKET.

In its Brief in opposition to the Motion of Defendant in Error to Dismiss, Affirm or advance to the Summary Docket the Plaintiff in Error contends that the Motion should not be considered by this Honorable Court for the reason that the Record has not been printed.

In its Brief the Plaintiff in Error makes a statement of what it contends the facts to be. This statement of facts appears on Pages 2 and 3 of the Brief of Plaintiff in Error.

While we realize that this Court will not consider a Motion to Dismiss where the facts are disputed and where the record has not been printed, we contend that in this case there is no real dispute as to the facts.

Plaintiff in Error states the facts in its Brief and we willingly concede, for the purpose of this Motion, that all the facts as stated by the Plaintiff in Error on Pages 2 and 3 of its Brief, as to the happening of this accident and the facts surrounding it are true and correct. In other words, the facts as claimed by Plaintiff in Error are conceded.

The facts as set forth by the Plaintiff in Error are the following:

I.

"Freight Car No. 125896 was loaded with wheat at Willow Lake, South Dakota, to be transported to Minneapolis, Minnesota.

II.

It was placed in a freight train at Willow Lake and hauled by Plaintiff in Error to Willmar, Minnesota, a division point, where the train was placed upon a track for inspection.

III.

This car was found to be defective in that the lifting lever, a part of the automatic coupling apparatus, was missing. There was also a broken buffer iron and a couple of rivets needing repairs.

IV.

The inspector who discovered these defects thereupon placed two "bad order" placards, spoken of in the record as "repair cards," upon the car at opposite ends.

V.

It was necessary to place the car on the repair track.

VI.

The car in question, No. 125896, was the seventh or eighth from the front end of the train. At the time of the accident this car, still coupled to other cars was being taken to track No. 10," the repair track.

VII.

"Coupled to this car at its defective end was another car which the switch foreman desired to leave on another track, No. 6, following which it was his intention to drop the defective car in on No. 10.

VIII.

He gave the engineer the usual back-up signal and when the cars were properly in motion he gave a stop signal and immediately stepped in between the defective car and the one to which it was coupled for the purpose of lifting the pin, the cars still being in motion. He in some way lost his balance or caught his foot in a switch point and fell, the car running over his leg." (Page 2 and 3 Brief of Plaintiff in Error.)

Now the facts as above stated, which are the facts as Plaintiff in Error contends them to be and which Defendant in Error, for the purpose of this Motion, concedes to be the facts, can lead to no conclusion but that the Motion of Defendant in Error to Dismiss this Appeal should be granted.

The position of the Plaintiff in Error is that the movement of a car to a repair track for the purpose of making repairs to the automatic coupler does not subject the carrier to liability under the Act.

This proposition is answered by a mere reading of the statute.

Under the Act of April 14th, 1910, Chapter 160, 36 Stat. L. 299, Federal Stat. Anno. 1912, Supp. Page 335-337, while a car may be moved to a repair track without subjecting the Company to the penalty provided by the Act, such movement is, "at the sole risk of the carrier and nothing in this statute shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee, caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure."

That the injury to the employee, H. W. Otos, was "by reason of or in connection with the movement or hauling of such car with equipment which is defective," cannot be disputed and is, in fact, conceded by Plaintiff in Error.

It is admitted in the statement of facts of the Plaintiff in Error that the employee, Otos, was injured while stepping between certain of the cars which were in motion, one of which was the car with the defective pin lifter, and that, as stated by Plaintiff

in Error on page 3 of its Brief, "he in some way lost his balance or caught his foot in a switch point and fell, the car running over his leg."

Now, assuming this statement of facts of Plaintiff in Error to be entirely true, it cannot be denied that the injury to the employee, Otos, occurred to him "by reason of or in connection with the movement or hauling of such car with equipment which is defective."

The Plaintiff in Error comes squarely within the statute.

The sole purpose of the Writ of Error is to delay payment of the judgment to the Defendant in Error and the Statements in the Brief of Plaintiff in Error, to our minds, conclusively show that this Writ of Error is of such a frivolous character that it should be dismissed by this Court.

The Plaintiff in Error concedes in its Brief that the car in question had not been taken to the repair track.

The Plaintiff in Error concedes that the car in question was defective.

The Plaintiff in Error concedes that the defective car was connected to and being moved with other cars on the operating tracks of Plaintiff in Error at the time of the accident.

The Plaintiff in Error now seeks to have this Court go directly contrary to its holding in a large number of decisions with which Plaintiff in Error is quite familiar, and hold that though the statute expressly provides that the movement of such car for

the purpose of repair is at the sole risk of the carrier, that, notwithstanding that fact, and notwithstanding the numerous decisions so construing such statute, that this Court should now hold that though Defendant in Error was injured while in the act of attempting to remove the car with the defective coupler to the repair track, but previous to the said car ever reaching the repair track, that the Defendant in Error should not recover.

The question raised by Plaintiff in Error in its Brief in opposition to the Motion to Dismiss is so frivolous that we do not feel that we should further take the time of this Court with a discussion thereof.

We simply again refer the Court to the statute, the Act of April 14th, 1910, and to the Delk case and other cases construing the Employers' Liability Law and the Safety Appliance Act.

Under these Statutes and under these decisions, which are clear and plain, and which the Plaintiff in Error, as one of the largest Railway Systems in the country, was certainly familiar with, it cannot but be apparent to this Court that Plaintiff in Error was not acting in good faith when it sued out the Writ of Error in this action.

The Writ of Error presents no substantial question and on the facts as we now concede them, for the purpose of this Motion, being the facts as stated in the Brief of the Plaintiff in Error, there is no question to be decided by this Court. The statute and the decided cases foreclose further argument.

The Writ of Error should be dismissed with ten (10) per cent damages for the manifest delay occasioned thereby.

Respectfully submitted,

SAMUEL A. ANDERSON,
Attorney of Record for Defendant in Error,
St. Paul, Minnesota.

TOM DAVIS and ERNEST A. MICHEL,
Both of Marshall, Minnesota,
Of Counsel.

(Office Supreme Court, U. S.
FILED
MAY 19 1915
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 429

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

H. W. OTOS,
Defendant in Error.

In Error to the Supreme Court of Minnesota.

MOTION TO DISMISS, AFFIDAVIT IN SUPPORT
THEREOF, AND BRIEF IN SUPPORT
OF MOTION.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 922

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

H. W. OTOS,
Defendant in Error.

In Error to the Supreme Court of Minnesota.

MOTION TO DISMISS, AFFIRM OR TRANSFER FOR HEARING TO THE SUMMARY DOCKET.

Now comes the above named defendant in error and moves this Court:

1st. That the writ of error in this action be dismissed on the ground that no question is presented

authorizing this Court to take jurisdiction of the above entitled action.

2nd. In the alternative, the defendant in error moves this Court that the judgment of the Supreme Court of the state of Minnesota be affirmed, on the ground that it is manifest that the writ of error therein was taken for delay only; and that ten per cent damages be awarded to defendant in error on the ground that said appeal was taken and said writ of error sued out merely for delay.

3rd. That the judgment of the Supreme Court of Minnesota be affirmed because the questions upon which the decision of the cause depends are so frivolous as not to need further argument.

4th. In case none of the above motions be granted, then the defendant in error will move the Court that the above entitled cause be transferred for hearing to the summary docket of said Court, because the case is of such a character as not to justify extended action.

SAMUEL A. ANDERSON,
St. Paul, Minnesota,
Attorney of Record for Defendant in Error.

TOM DAVIS and ERNEST A. MICHEL,
Both of Marshall, Minn., of Counsel.

NOTICE OF MOTION.

The plaintiff in error is hereby notified that the defendant in error will, on the 24th day of May, A. D. 1915, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit, for the consideration of said Court the foregoing motions, and each of them and brief in support thereof hereto attached including portions of the record as contained in an appendix thereto, all of which are now served upon you herewith.

SAMUEL A. ANDERSON,
St. Paul, Minnesota,
Attorney of Record for Defendant in Error.

TOM DAVIS and ERNEST A. MICHEL,
Both of Marshall, Minnesota, of Counsel.

Received a copy of the foregoing notice, brief and appendix thereto attached, by personal service thereof this 29th day of April, A. D. 1915.

E. C. LINDLEY,
St. Paul, Minnesota,
Attorney of Record for Plaintiff in Error.

STATEMENT OF THE CASE.

This is an action commenced in the District Court of Yellow Medicine County, Minnesota, by H. W. Otos as plaintiff (defendant in error here), vs. Great Northern Railway Company, defendant (plaintiff in error here).

This action was based on a violation of the Safety Appliance Act of March 2nd, 1893, together with the amendment of March 2nd, 1903, and the amendment of April 14, 1910, and the Employers' Liability Act of April 22nd, 1908.

THE COMPLAINT.

The complaint, which is printed in the appendix hereto, alleged that the defendant (plaintiff in error here) was an interstate carrier by railroad, and that plaintiff (defendant in error here) was employed by said railroad in Interstate Commerce at the time of his injury.

It was further alleged that while plaintiff was employed by said railroad company in Interstate Commerce that it was his duty to uncouple one of the cars of defendant from an adjoining car; that said car was improperly equipped and had a defective coupler which could not be uncoupled without the necessity of plaintiff going between the ends of the

cars; that plaintiff went between the ends of the cars to uncouple the same, and that while attempting to so uncouple said cars he was injured.

The complaint alleged that the injuries sustained by plaintiff occurred by reason of the violation of the statutes and laws of the United States requiring the defendant to have its cars used in Interstate Traffic equipped with automatic couplers, and by reason of the violation by defendant of other statutes and laws enacted for the benefit of employees of Interstate Carriers by railroad, while engaged in Interstate Commerce.

DEFENDANT'S ANSWER.

It was admitted by the answer of defendant, which is printed in the appendix hereto, that the railroad company was an Interstate Carrier.

The employment of plaintiff was admitted.

Paragraph three of the answer admitted the injury to plaintiff while "SO EMPLOYED BY DEFENDANT," resulting in the loss of plaintiff's leg.

The answer also set up the plea of contributory negligence and the plea of assumption of risk, though neither of these defenses were available to the railroad company under the Employers' Liability Law, it having been shown on the trial that the Safety Appliance Act had been violated.

PLAINTIFF'S REPLY.

By the way of reply, the plaintiff interposed a general denial. A verdict was rendered by the jury in favor of plaintiff in the Trial Court, being the District Court of Yellow Medicine County, Minnesota.

From an order denying a new trial the railroad company appealed to the Supreme Court of Minnesota, which Court affirmed the order of the lower Court.

Thereupon judgment was entered in the District Court of Yellow Medicine County and an appeal again taken from such judgment to the Minnesota Supreme Court. That Court affirmed the judgment of the lower Court, the cause being determined on the record in the first appeal, the Supreme Court, on the second appeal, simply adhering to its decision on the appeal from the order denying a new trial. Judgment was then entered in the Supreme Court of Minnesota and thereafter the writ of error was sued out to that Court.

STATEMENT OF FACTS.

For the purpose of this motion, the facts sufficiently appear in the opinion of the Supreme Court of Minnesota reported in 150 N. W. 922, which is printed as an appendix hereto. That Court said:

"Plaintiff was a switch foreman in the defendant's yards at Willmar. On September 11, 1912, a train came into Willmar from the west. It contained among others a loaded car from Willow Lake, S. D., consigned to Minneapolis. This car was coupled with automatic couplers to a car consigned to Duluth, by way of Superior, Wis. The pin lifter on the Minneapolis car was out of order. At Willmar the Duluth car was to be transferred to another train. There is some evidence that the Minneapolis car was to be switched to the repair track, before it proceeded further, for the purpose of repairing the coupler. There is no evidence that it was ever so transferred. The car was carried to Minneapolis on the following day. Plaintiff and his crew were engaged in cutting up this train and in switching the cars to be removed from it to their proper destination. At the time of the accident he had three cars attached to a switch engine; the Duluth car was in the rear and the Minneapolis car in the middle. Plaintiff was about to cut off the Duluth car in order to switch it to the Duluth track. He stood on the side from which the pin lifter was missing. He could not make the uncoupling from that side without going in between the cars. This he did, and in doing so he was run over and sustained severe injuries."

"It is conceded that defendant's road at Willmar is a highway of Interstate Commerce and that the traffic in which this car was engaged when in transit was Interstate Traffic, and that if it was in transit at this time, then, under the Federal Safety Appliance Act and Employers' Liability Act, defendant is liable for any injury caused by the defective coupler, and neither contributory negligence nor assumption of risk constitutes any defense. The contention of defendant is that "the condition of the car was such that it had to go to the repair track for repair," that "it was necessary that the through movement of the car be interrupted at Willmar for the purpose of repairs," and that therefore "the defective car had been withdrawn from commerce" and was "not in course of transit."

The contention was made by the defendant (plaintiff in error here) in the Trial Court that neither the Employers' Liability Act nor the Safety Appliance Act applied to the facts in the case at bar.

It was also contended that whether or not the injured employee was engaged in Interstate Commerce was a question which should have been submitted to the jury.

Such contention is without merit and was decided adversely to plaintiff in error by the Trial Court

and by the Minnesota Supreme Court, in the opinion printed as an appendix hereto.

APPLICABILITY OF SAFETY APPLIANCE ACT.

Violation Thereof.

To show the fallacy of the contention of plaintiff in error that the Safety Appliance Act does not apply to this case, and that it had not been violated, and also to call the attention of the Court to the frivolousness of the questions presented by the writ of error in this action, we submit the following facts to the Court:

I.

It is admitted in the answer that the defendant is an Interstate road.

II.

It was admitted on the trial that the car in question contained Interstate Commerce.

III.

It was admitted that the car in question, with a defective pin lifter, was attached to a car consigned

to Duluth, Minn., and that such car in going to Duluth, passed through Superior, Wis.

IV.

It was admitted that the track on which plaintiff was working was used indiscriminately for interstate and intrastate commerce.

V.

It was admitted that the pin lifter upon the car upon which plaintiff was working at the time of his injury was missing from said car.

There was an attempt made by the railroad company in the Trial Court to show that the car with the missing pin lifter was being prepared for switching onto the "repair track" for repairs at the time of the injury.

Plaintiff's testimony showed that:

> "At the time of the accident he had three cars attached to a switch engine; the Duluth car was in the rear and the Minneapolis car in the middle. Plaintiff was about to cut off the Duluth car in order to switch it to the Duluth track. He stood on the side from which the pin lifter was missing. He could not make the uncoupling from that side without going in between the cars. This he did, and in doing so he was run over and sustained severe injuries."

The jury found a general verdict for the plaintiff and, presumably, found that the car with the defective coupling was not being switched to the "repair track" for repairs as contended by the railroad company, but was being switched, as contended by Otos, while coupled to a car going to the Duluth track.

(See Opinion Minnesota Supreme Court, appendix.)

To summarize the facts, we have a car of wheat consigned from Willow Lake, in the state of South Dakota, to Minneapolis, in the state of Minnesota.

On its way to Minneapolis the car, before reaching its destination, is switched in the yards of the railroad company at Willmar, Minnesota.

The pin lifter, forming a part of the coupling device, is missing, and it is necessary for the switch foreman (defendant in error here) to go between the ends of this car and the car adjoining it to uncouple them.

In attempting to make this uncoupling, before the car containing Interstate Commerce had reached its destination, the defendant in error is injured.

These are the concrete facts and from such facts it is difficult to conceive of a Federal question in this case. In the Court below plaintiff in error insisted

that the Employers' Liability Act and the Safety Appliance Act did not govern and contended that the defective car was to be switched onto the repair track (which was disputed by the defendant in error) and that this resulted in "removing the same from the plane of Interstate Commerce," and hence the Employers' Liability Act could have no application.

The contention of the railroad company was thus stated by the Minnesota Supreme Court: "The contention of defendant is that the condition of the car was such that it had to go to a repair track for repair," and

> "It was necessary that the through movement of the car be interrupted at Willmar for the purpose of repairs," and that therefore, "the defective car has been withdrawn from commerce," and was "not in the course of transit."

As to the intention to switch the car to the repair track, the Supreme Court of Minnesota, in the decision hereto appended, said:

> **"There is some evidence that the Minneapolis car was to be switched to the repair track, before it proceeded further, for the purpose of repairing the coupler. There is no evidence that it was ever so transferred. The car was carried to Minneapolis on the following day. Plaintiff and his crew were engaged in**

cutting up this train and in switching the cars to be removed from it to their proper destination."

The contention was also made that the Safety Appliance Act did not apply, but this contention is so frivolous as to need no argument or comment. The answer admitted that the railroad was an Interstate Carrier, in other words a "railroad engaged in Interstate Commerce," within the wording of the Safety Appliance Act of March 2nd, 1903, Chapter 976, 32 Stat. L. 943, Vol. 10, Fed. Stat. Ann. 375.

The plaintiff in error, the Great Northern Railroad Company, under the admission in the answer, is a railroad engaged in Interstate Commerce, and as such the Safety Appliance Act would apply to all cars used on its line, whether the cars were used in Interstate or Intrastate Commerce, within the Safety Appliance Act and the rule laid down in the case of Southern Railway Company vs. United States, 222 U. S. 20, 56 L. ed. 72.

ARGUMENTS, POINTS AND AUTHORITIES.

In the assignments of error filed with the petition to obtain the writ of error in this case, which assignments of error are printed in the appendix hereto, several contentions were set forth by plaintiff in error

as being questions entitling plaintiff in error to a hearing in the Supreme Court of the United States.

The only questions which we can possibly conceive, which might involve questions of Federal Law, are the questions raised by the assignments of error relative to the applicability of the Safety Appliance Act and the Employers' Liability Law, and the question whether Otos was engaged in Interstate Commerce at the time of his injury.

From the statement of facts heretofore made, it is apparent that both of these acts apply, and the contention that defendant in error was not engaged in Interstate Commerce at the time of his injury because of the claim that the defective car had been removed from commerce is as frivolous as the claims that the Safety Appliance Act and the Employers' Liability Law do not apply and the contention cannot be serious, in view of the clear decision of this Court in the case of Delk vs. St. Louis S. & F. R. R. Co., 220 U. S. 580, 55 L. ed. 590.

All the contentions of the railroad company were decided adversely to it, first by the Trial Court and then on appeal, by the Supreme Court of the State of Minnesota.

In fact, the main question considered by the Supreme Court of the State of Minnesota was the question of damages.

The Supreme Court of Minnesota, relative to the question of Interstate Commerce and the applicability of the Federal Statutes, held as follows:

> "We are of the opinion that at the time of plaintiff's injury this defective car was in transit and was being used in Interstate Commerce. A car in process of transportation from one state to another is usually in transit and engaged in commerce from the time it is started upon its passage until the delivery of its cargo at the place of destination, United States vs. Colorado & N. W. R. Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893.
>
> "It is not taken out of commerce because in need of repair, nor because of a purpose to repair it, nor because of a design to set it upon a repair track in due course for that purpose. We need not consider what the situation might have been if this car had been set at rest on the repair track. This had not been done. At the time of the accident it was still a part of an Interstate train. Its cargo had not reached its destination and was not ready for delivery to the consignee. It was attached to and was being moved with another interstate car, from which it was in due course being uncoupled. Clearly the defective car was in transit and was being used in interstate commerce.
>
> "The federal decisions leave no doubt upon this point."

(See opinion Supreme Court of Minnesota, appendix hereto.)

NO QUESTION AS TO THE INTERPRETATION OF THE EMPLOYERS' LIABILITY LAW OR THE FEDERAL SAFETY APPLIANCE ACT WAS PRESENTED TO THE TRIAL COURT OR CONTENDED FOR IN THE SUPREME COURT OF MINNESOTA.

The contention of the railroad company is that the Safety Appliance Act and Employers' Liability Law do not apply and that the car with the defective coupler, though it had not reached its destination, was not engaged in Interstate Commerce, because as the compainy claimed, it was to be switched to the repair track for repairs.

CONTENTIONS OF DEFENDANT IN ERROR ON MOTIONS TO DISMISS, AFFIRM OR ADVANCE TO SUMMARY DOCKET.

FIRST.

That the writ of error in this action be dismissed on the ground that no question is presented authorizing this Court to take jurisdiction of the above entitled action.

There is no substantial ground or basis for the writ of error in this action.

The plaintiff in error is an interstate railroad

and employed the defendant in error in Interstate Commerce at the time of his injury.

The action was prosecuted under the Employers' Liability Law, so called, and under the Safety Appliance Act, being the act of March 2, 1893, with subsequent amendments thereto.

These acts have been so often before the Court and so thoroughly settled by its construction as to afford no substantial basis for a writ of error where the facts are similar to those in the case at bar.

Where the contention that a right or immunity under the Federal Employers' Liability Law of April 22nd, 1908, was denied, and such contention is **wholly lacking merit,** it will not serve as the basis for a writ of error from the Federal Supreme Court to a State Court.

See:

Wabash Railway Company vs. Hayes, 234 U. S. 86, 34 Sup. Ct. Rep. 729, 58 L. Ed. 1226.

See, also:

Southern Ry. Co. vs. Gadd, 233 U. S. 572, 34 Sup. Ct. Rep. 572, 58 L. Ed. 1099.

A mere reading of the facts in this case shows that the contentions of the plaintiff in error are "wholly lacking in merit."

The question of a Federal right must be a substantial one to support a writ of error.

See:

Roller vs. Murray, 234 U. S. 738, 58 L. Ed. 1570.

This question will be more fully argued under the second ground for affirmance or dismissal, with the contention that damages should be awarded to the defendant in error on the ground that the appeal was taken merely for delay.

SECOND.

In the alternative the defendant in error moves this court that the judgment of the Supreme Court of the State of Minnesota be affirmed, on the ground that it is manifest that the writ of error therein was taken for delay only, and that ten per cent damages be awarded to defendant in error on the ground that said appeal was taken and said writ of error sued out merely for delay.

From an examination of the facts in this case, we contend that it appears that the writ of error herein was sued out merely for delay and hence that the decision of the Supreme Court of Minnesota should be affirmed and that damages should be awarded to defendant in error under Rule Twenty-three (23) of this Court.

All the questions raised by the plaintiff in error

are so entirely frivolous and unsubstantial and the writ of error so palpably sued out merely for delay that we contend a penalty of ten per cent should be assessed against plaintiff in error.

From what has heretofore been said and the authorities hereinbefore cited, the frivolousness of the questions raised by the plaintiff in error are plain to this Court.

As stated by this Court in the case of Equitable Life Assurance Society vs. Brown, 187 U. S. 308, 23 Sup. Ct. Rep. 123, 47 L. Ed. 190:

> "Although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this Court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit."

The alleged Federal question in this case does not involve any true construction of the Employers' Liability Act or the Safety Appliance Act, and when the alleged Federal question is examined in this Court, with reference to the averments of fact upon which it was made to depend, it will be apparent to this Court that this is a case where damages for delay should be awarded.

The claim that the car consigned from Willow Lake, South Dakota, to Minneapolis, Minnesota, was not engaged in Interstate Commerce while being switched in the yards at Willmar, has certainly been

> **"so explicitly decided by this Court as to foreclose further argument on the subject and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit."**

This question is fully settled by the Delk case and the rule there laid down has been since followed in all cases before this Court. Plaintiff in error and its counsel knew this, but the shadow of a Federal question presented another opportunity for delay, which the company promptly took advantage of in suing out this writ of error.

To practice before the Supreme Court of the United States, the highest judicial tribunal in the world, is an honor, a privilege, and it occurs to us that counsel should not clog the docket of this Court with appeals of this nature, arising under the Employers' Liability Law.

To do so works not only a hardship and delay on the unfortunate employee, but must and will necessarily result in burdening this Court with unnecessary labor in the disposition of frivolous appeals and writs of error.

Under the rulings of this Court practically all injuries to employees of interstate railroads come within the Employer's Liability Law. These cases, necessarily, are based on a Federal statute, and if railroad counsel persist in suing out writs of error in all actions under this statute, when decided adversely to them in the lower courts, this Court will have little time to decide other cases.

No counsel can seriously contend, before this Honorable Court, that the writ of error in this action was sued out in good faith. If it were, then we must conclude that all the previous decisions of this Court construing the Safety Appliance Act and the Employer's Liability Law are of no value or meaning and that the construction given these statutes does not serve as a guide to counsel seeking a true interpretation of these laws.

This is not a case where a single decision may have been overlooked or a rule of law unknown to counsel, especially counsel engaged in defending actions under these statutes.

Furthermore, the questions of general law presented to this Court, as shown by assignments of error numbers one, five, six, eight and nine, clearly show the frivolous character of the contentions of the plaintiff in error.

This being true, we contend that this Court should affirm the judgment of the Court below with ten per cent damages for the manifest delay caused by the prosecution of this writ of error.

See:

Texas & Pacific Railway Co. vs. Prater, 229 U. S. 177, 57 L. Ed. 1139.

In the case of Southern Railway Company vs. Gadd, 233 U. S. 572, 58 L. Ed. 1099, the questions involved and used as a basis for a writ of error were questions of general law and did not involve any special construction of the statute upon which the action was based—the Employer's Liability Law.

The plaintiff in error here claims that the jury in the Trial Court should have passed on the question of whether or not defendant was engaged in Interstate Commerce at the time of his injury. We quote the following statement of Chief Justice White in the case of Southern Railway Company vs. Gadd, supra, which is especially applicable to the situation here:

> **"Granting that, in its ultimate analysis, the question involves an appreciation of the Employer's Liability Law, nevertheless we are of opinion that the absolute want of merit in the proposition, in view of the state of proof, caused the request, intrinsically considered, to be so unsubstantial and frivolous as not to fur-**

> **nish any support for the contention that its refusal raised a question concerning the interpretation of the statute."**

And in the case at bar, the facts do so conclusively show that the defendant in error was engaged in Interstate Commerce as to leave no question for doubt or to be submitted to a jury in this case.

And, as further stated, in the Gadd case, supra:

> "It is manifest, on the face of the record, that the case was carefully and fully considered in both of the courts below. * * * We think the conclusion that the writ of error was prosecuted only for delay is plainly justified, and that a penalty by way of damages should be imposed."

Take, for instance, the questions raised by the assignments of error presented and filed with the clerk of the Supreme Court of the State of Minnesota, with the petition for the writ of error:

Assignment of error number eleven is as follows:

> "THE SAID SUPREME COURT ERRED IN HOLDING THAT THE DAMAGES ALLOWED TO DEFENDANT IN ERROR WERE NOT EXCESSIVE."

What Federal question is involved in this assignment?

There is no Federal question and the contention is frivolous and palpably for delay under the rule laid down in the early cases in this Court and approved in Phoenix Railway Co. vs. Landis, 231 U. S. 578, 34 Sup. Ct. Rep. 179, 58 L. ED. 377.

WRIT OF ERROR—INSUFFICIENT BASIS.

Where the contention that a statute is repugnant to the provisions of the 14th Amendment to the Federal Constitution, has been fully settled and determined by numerous decisions, such contention is not sufficient to afford a basis for a writ of error.

See:

Manhattan L. Insurance Company vs. Cohen, 234 U. S. 123, 34 S. C. Rep. 874, 58 L. Ed. 1245.

In the Trial Court, being the District Court of the County of Yellow Medicine, in the State of Minnesota, the plaintiff in error contended that the railroad company was not engaged in Interstate Commerce, and that defendant in error was not employed in such commerce at the time of his injury.

The contentions as to Interstate Commerce have

been so fully settled by the previous decisions of this Court that, in this case, such contentions cannot afford a proper basis for a writ of error and the same should be dismissed.

Where supposed Constitutional questions have already been twice decided by the Supreme Court to be wanting in merit, no basis for the exercise of jurisdiction is afforded.

See:

Louis Elle, etc., Debern, vs. Safe Deposit and Trust Co., 233 U. S. 24, 58 L. Ed. 833.

It is the settled law of this Court that where the claimed Federal questions are unsubstantial and frivolous they cannot serve as the foundation for a writ of error, either from a Federal Supreme Court to a District Court, nor from the Federal Supreme Court to the Supreme Court of a state.

See:

Brolan et al. vs. United States, U. S. Adv. Ops. 1914, Page 285, decided February 23rd, 1915.

INTERSTATE COMMERCE FULLY SETTLED.

All questions as to Interstate Commerce, so far as this case is concerned, have been fully settled and determined by the following cases:

Delk vs. St. Louis & F. S. R. Co., 220 U. S. 580, 55 L. Ed. 590.

Johnson vs. Southern Railway Co., 196 U. S. 1, 49 L. Ed. 363.

Chicago, M. & St. P. R. Co. vs. Voelker, 129 Fed. 522, 65 C. C. A. 226.

The cases last above cited thoroughly and fully settle all questions as to whether or not the defendant in error was engaged in Interstate Commerce and whether he was employed in such Interstate Commerce by the plaintiff in error at the time of his injury.

And, under the well settled rule as laid down in the cases of Pederson vs. Delaware, L. & W. R. Co., 229 U. S. 146, 57 Law Ed. 1125, and St. Louis, S. F. & T. R. Co. vs. Seale, 229 U. S. 156, 57 L. Ed. 1129, and the Delk case, supra, it cannot but be apparent to this Court that the contention that there is a substantial Federal question involved in this case is entirely without merit and too unsubstantial to serve as the basis for a writ of error.

The claimed Federal questions are so frivolous and unsubstantial that it cannot but be manifest to this Court that the writ of error in this action was sued out **solely for the purpose of delay,** and for this reason the writ of error herein should be dismissed.

DAMAGES ON DISMISSAL.

Should this Court dismiss the writ of error in this case, we respectfully submit that the penalty should still be imposed.

That the Court has the right to impose the penalty in case of dismissal, as well as in case of an affirmance, is settled by the case of Deming vs. Carlisle Packing Company, 226 U. S. 102, 57 L. Ed. 140, 34 S. C. Rep. 902.

THIRD.

That the questions on which the decision of the cause depends are so frivolous as not to need further argument.

On the authority of the Delk case, supra, and the cases hereinbefore cited, defendant in error contends that the questions upon which the decision of this cause depends are so frivolous as to need no further argument.

In Delk vs. St. Louis & S. F. R. R. Co., 220 U. S. 580, 55 L. Ed. 590, supra, the facts were as follows:

A freight car loaded with interstate freight was placed on a side track in the railway yards at destination to AWAIT SIMPLE REPAIRS to the automatic coupler. Its cargo had not reached its des-

tination and was not then ready for delivery to the consignee.

Under such facts it was held that the car was used in moving Interstate Commerce, within the meaning of the Safety Appliance Act of March 2nd, 1893 (25 Stat. L. 531, Chap. 196, U. S. Comp. Stat. 1901, Page 3174, Vol. 10, Fed. Stat. Annot., Page 375).

In the Delk case the car was placed on the side track to AWAIT REPAIRS to the automatic coupler. In this case the record does not show that the car was placed on the side track to await repairs to the coupler, but **was being switched, in the course of switching operations,** in the railway yards at Willmar, and if the car in the Delk case was engaged in Interstate Commerce, as held by this Court, then the claim that Otos was not engaged in Interstate Commerce and the car about which he was working had been withdrawn from Interstate Commerce are too frivolous for argument.

The questions urged by the plaintiff in error here were fully, clearly and unquestionably settled, adverse to its contentions in the case of Delk vs. Railway Company, supra, and from that case the manifest unsoundness and the frivolity and insincerity of its position clearly appears.

FOURTH.

In case the above motions be not granted, then the defendant in error will move the Court that the above entitled cause be transferred for hearing to the summary docket of said Court because the case is of such a character as not to justify extended argument.

What has been said heretofore would apply under this sub-division of the motion to dismiss.

Should the Court hold that there is a Federal question which should be determined by the Court, then we respectfully contend that this cause should be transferred for hearing to the SUMMARY DOCKET.

This case is not one to justfy an extended argument. No complicated questions or substantial questions involving the construction of a Federal statute can be presented under the facts in this case.

That the defendant in error was employed in Interstate Commerce at the time of his injury is well settled by the decisions of this Court.

The questions of assumption of risk and contributory negligence under the Federal Employers' Liability Law and the Safety Appliance Act are no longer open to debate, especially in view of the recent case of Grand Trunk Railway Company vs. Lindsay, 233 U. S. 42, 58 L. Ed. 838.

In the case last above cited the facts showed that the plaintiff was one of a crew working a switch engine, and that in a yard near Chicago such engine, coupled with four loaded freight cars, moving in Interstate Commerce, were held in order to make a coupling with a number of other loaded freight cars in Interstate Commerce, to the end that an Interstate train bound eastward be made up and depart; when by impact it was attempted to make a coupling the cars failed to couple automatically, and after several efforts to cause them to do so, the plaintiff, as switchman, walked along beside the end of the car as it approached again to point of coupling, signalled to the engineer to stand fast, and entered between the cars for the purpose of ascertaining and remedying, if possible, the cause of the trouble. While between the cars and engaged in handling the coupler, the cars were switched up and he was caught and his arm crushed.

The Supreme Court, in the above case, under the facts as stated, held that contributory negligence of the switchman was no defense, nor could he be held to have assumed the risk of his employment. The Court said:

> "Contributory negligence on the part of the employee does not operate even to diminish the recovery where the injury has been oc-

> casioned in part by the failure of the carrier to comply with the exactions of an Act of Congress enacted to promote the safety of employees. In that contingency the statute abolishes the defense of contributory negligence not only as a bar to a recovery, but for all purposes."

Strictly speaking, there is no question of assumption of risk in this case. The acts of defendant in error would come under the head of contributory negligence and not assumption of risk.

See:

> Seaboard Air Line Co. vs. Horton, 233 U. S. 492, 58 L. Ed. 1062-1070.

The questions to be decided in this matter are solely questions of general law and do not involve any special construction or application of any Federal statute.

It is the well settled rule of this Court that questions of general law do not present any Federal question to be determined by this Court.

In the case of Southern Railway Company vs. Gadd, 233 U. S. 572, 58 L. Ed. 1099, the action was based on the Employers' Liability Law. Plaintiff was a locomotive fireman and the controversy in the case was whether the personal injury which he suf-

fered was occasioned by the reckless and negligent conduct of the engineer in moving the engine under circumstances disclosed by the proof. No question involving the construction of the Employers' Liability Law was before the Court, the questions being only questions of general law. As stated by Mr. Chief Justice White in that case:

> "Coming to the case made by this record, although, as we have said, it is manifest that the cause of action was based upon the Employers' Liability Act, we are of the opinion that it presents for decision no question concerning the interpretation of that act, since all the questions which require to be decided clearly involve consideration of general law depending in no sense upon the particular significance of the Employers' Liability Act. Under these conditions it is apparent that the case is absolutely controlled by the King case, and we therefore content ourselves with saying that, as after an adequate examination of the records, we find no ground whatever affording a clear conviction that error was committed, affirmance must follow."

As further showing the unsubstantial character of the questions raised by the plaintiff in error, we especially call the attention of the Court to the assignments of error filed with the petition for writ of error in this cause and printed in the appendix hereto.

Assignment of error No. 1 is as follows:

> **"The said Supreme Court erred in affirming the judgment entered in the District Court in favor of plaintiff in error."**

This is equivalent to a contention that the request made in the Trial Court by the defendant to take the case from the jury by a peremptory instruction should have been granted.

Relative to this matter, we quote from the words of Mr. Chief Justice White in the case of Southern Railway Company vs. Gadd, supra: "The first contention is based upon the refusal of a request made by the defendant to take the case from the jury by a peremptory instruction. Granting that, in its ultimate analysis, the request involved an appreciation of the Employers' Liability Act, nevertheless we are of opinion that the absolute want of merit in the proposition, in view of the state of the proof, caused the request, intrinsically considered, to be so unsubstantial and frivolous as not to furnish any support for the contention that its refusal raised a question concerning the interpretation of the statute."

> Assignment of error number two is to the effect that the Court erred in holding that **the coupling apparatus was being used in Interstate Commerce within the meaning of the Federal Safety Appliance Act.**

A mere reading of the STATEMENT OF FACTS in this case shows such contention to be frivolous and unsubstantial and the decided cases of this Court foreclose further argument on this point.

Assignment of error number three is to the effect that the **Supreme Court erred in holding that the defendant in error was injured while engaged in Interstate Commerce.** The unsubstantiality of this question has been fully shown heretofore and is not now open to further argument.

The same thing applies to assignment of error number four, in which **the contention is made that the car in question was withdrawn from commerce and that the Trial Court should so have instructed the jury.**

The Supreme Court of Minnesota did not sustain this contention, saying:

> **"We are of the opinion that at the time of plaintiff's injury this defective car was in transit and was being used in Interstate Commerce. The Federal decisions leave no doubt upon this point,"** citing Delk vs. St. Louis & S. F. R. Co., 220 U. S. 580, 31 S. C. 617, 55 L. Ed. 590.

Assignments of error numbers five and six relate to the question of **proximate cause.** These assignments present no Federal question and further show that the writ of error in this case is prosecuted

solely for delay, and they do not involve any question justifying extended argument.

The contention in assignment of error No. V was disposed of by the Supreme Court of Minnesota as follows:

> "Defendant contends that the proximate cause of plaintiff's injury was not the defective condition of the coupling, but his violation of a rule of the employer forbidding employes going between moving cars. It appears that there was such a rule. There is evidence that in this yard it had, with the knowledge of the yardmaster, been more honored in its breach than in its observance. But, whatever may be said of the propriety of plaintiff's act in going between the cars, it was only one of the concurring causes of plaintiff's injury. The violation of the statute was one cause of his injury. Turritin vs. C., St. P., M. & O. Ry. Co., 95 Minn., 408, 104 N. W. 225; Sprague vs. Wis. Cent. Ry. Co., 104 Minn. 58, 116 N. W. 104. This is all that is necessary to create liability. The statute which abolishes contributory negligence——
>
> "Would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act.' Grand Trunk Ry. Co. vs. Lindsay, 233 U. S. 42, 47, 34 Sup. Ct. 581, 582 (58 L. Ed. 838, Ann. Cas. 1914, C. 168, quoting 201 Fed. 844, 120 C. C. A. 166)."

Otos vs. Great Northern Railway Co., 150 N. W. 923.

Assignment of error number seven is to the effect that **whether the defendant in error was engaged in Interstate Commerce should have been left to the jury.**

The frivolousness of this assignment is apparent when we consider that under the facts there could be no question but that defendant in error was engaged in Interstate Commerce at the time he was injured. The jury could not have found otherwise, and had they done so their verdict must have been set aside.

Furthermore, the question of Interstate Commerce is not one of fact for a jury, but one of law for the Court to determine.

> Pederson vs. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. Ed. 1125.
> Delk vs. St. Louis & St. F. R. Co., 220 U. S. 580, 55 L. Ed. 590.

Assignment of error number eight is to the effect that **the Court should have instructed the jury that defendant in error was working without the scope of his employment at the time of his injury.** This, again, involves a question of **general law** and does not involve any question of the application or construction of a Federal statute.

> Southern Railway Co. vs. Gadd, 233 U. S. 572, 58 L. Ed. 1099.

Assignment of error number nine involves the question of Interstate Commerce stated in another form and does not merit comment at this time.

Assignment of error number ten is to the effect that the car with the repair card tacked on it was not engaged in Interstate Commerce. This contention is disposed of by the case of Delk vs. Railway Company, supra.

Assignment of error number eleven again shows the lack of good faith, the frivolousness and unsubstantiality of the claim of plaintiff in error. This assignment is that **the Supreme Court erred in holding that the damages were not excessive.**

This is not a Federal question and the excessiveness of the verdict will not be considered in the Federal Supreme Court. Nothing could better show the frivolousness of the contentions of plaintiff in error than such an assignment and claim.

See:

Phoenix R. Co. vs. Landis, 231 U. S. 578, 34 S. C. Reports 179, 58 L. Ed. 377.

Respectfully submitted,

SAMUEL A. ANDERSON,
Attorney of Record for Defendant in Error.
St. Paul, Minnesota.

TOM DAVIS and ERNEST A. MICHEL,
Both of Marshall, Minnesota.
Of Counsel.

APPENDIX.

Pursuant to the rules and practices of this Honorable Court, and for the purposes of these motions only, defendant in error has caused to be printed the complaint in the original action, the answer and the reply therein, the opinion of the Supreme Court of Minnesota, and the assignments of error to the Supreme Court of Minnesota.

Authorities:

Carey vs. Houston, 150 U. S. 179.
Rouch vs. Nevin, 128 U. S. 579.

STATE OF MINNESOTA, COUNTY OF YELLOW MEDICINE. DISTRICT COURT.

H. W. OTOS,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, A Corporation,

Defendant.

COMPLAINT.

Plaintiff, for his complaint in the above entitled action, alleges and shows to this Court:

1. That the defendant now is and at all times herein mentioned was and has been a railway corpora-

tion, and as such the owner and operator of a line of railroad extending into and through the states of Minnesota and South Dakota and other states, and defendant has been at all times herein mentioned engaged in hauling passengers and freight on said line of railroad for hire as a common carrier.

That said line of railway of said defendant extends into and through the city of Granite Falls, in the county of Yellow Medicine, state of Minnesota, and that said defendant has and maintains a railway depot and station agent at said city of Granite Falls, Minnesota.

2. That on the 11th day of September, 1912, and for some time prior thereto, this plaintiff was in the employ of said defendant as a brakeman and switchman, and in the course of his employment was compelled to and did work in and about said railway yards in said city of Willmar, Minnesota; and that among other duties it was the duty of plaintiff to assist in the switching of freight cars and to couple and uncouple freight cars and do and perform other necessary work in the switching of the same, and such work as is common to brakemen and switchmen generally.

3. That on or about the 11th day of September, 1912, and while said plaintiff was so engaged as a servant and employee of defendant, and while he

was in the performance of his duties as a brakeman and switchman for said defendant, and while he was about to uncouple one of the railway freight cars of said defendant from an adjoining car, which cars formed part of a train of cars then being moved in said switch yards in said city of Willmar, said defendant negligently, unlawfully and contrary to the statutes and laws of the United States in such cases made and provided, hauled and used, and then and there had upon its said railway line in said city of Willmar, Minnesota, and in and about which plaintiff was compelled to work, in moving interstate traffic, a certain car equipped with a certain automatic coupler, which said coupler and the appliances thereof and connecting therewith were then and there in such a defective, broken and inoperative condition of repair that the same could not be uncoupled from the side of said car without the necessity of defendant's switchman or brakeman going between the end of said car and the car from which the same was to be uncoupled; and plaintiff further alleges that it then and there became and was the duty of this plaintiff to said defendant, as such switchman and brakeman, to uncouple said car, so equipped with said defective, broken and inoperative coupler, from a certain other car then standing upon the same track and connected with and coupled to said car containing said defective,

broken and inoperative coupler; and as a direct result, and in consequence of said defective, broken and inoperative condition of said coupler this plaintiff was then and there required to and did go between the ends of said cars for the purpose of uncoupling said cars and for the purpose of working said defective, broken and inoperative coupler so that said cars could be uncoupled, and that while plaintiff was so between the ends of said cars for the purpose of and engaged in the work aforesaid, the said cars were being moved on said track by one of defendant's engines, and that while plaintiff was between said cars one of his feet became caught and held fast between a certain guard rail then located in said yard and a main rail in said yard, and that plaintiff was thereupon run over by several cars of said defendant whereby he suffered the injuries hereinafter set forth.

4. That it was the duty of said defendant to keep the space between the guard rail and the main rail at the point where plaintiff was injured properly and sufficiently guarded or blocked so as to prevent injuries to employees, but that said defendant not regarding its said duty, wrongfully and negligently neglected and omitted to properly and sufficiently guard or block said space and in consequence thereof, and also by reason of defendant furnishing such unsafe, defective and inoperative coupler as herein

before set forth, plaintiff's foot was caught and held in said space between said guard rail and main rail and he was run over and received the injuries herein complained of.

5. That the injuries hereinbefore complained of occurred to plaintiff by reason of the violation of the statutes and laws of the United States requiring the defendant to have its cars used in interstate traffic equipped with automatic couplers, which could be coupled and uncoupled without the necessity of men going between the ends of the cars and by reason of the violation by said defendant of other statutes and laws of the United States enacted for the benefit of employees of interstate carriers by railroad while engaged in Interstate Commerce, and that had said defendant not violated said statutes, this plaintiff would not have been compelled to go between the ends of said cars to make such a coupling and he would not have been injured as herein alleged.

6. That the car which contained said defective, broken and inoperative coupler was loaded with merchandise and had been shipped from a point in the State of South Dakota to a point in the State of Minnesota, and when said car was in said City of Willmar, Minnesota, it was enroute from the State of South Dakota to the City of Minneapolis, Minnesota. That said car was being used in the transpor-

tation of Interstate Commerce and being used in the hauling of merchandise from the State of South Dakota into the State of Minnesota, and that said defendant now is an interstate carrier, and is and was at all times herein mentioned engaged in operating said line of railroad where plaintiff was injured as an interstate carrier and that said line of railroad is an interstate railroad.

7. That the coupler of said car which ran over plaintiff was so defective, broken and inoperative that said car could not be uncoupled from or coupled to another car without the necessity of some one going between the ends of the cars and lifting the pin, which was intended to hold the coupling appliance together. That the rod intended to be used in lifting said pin from said coupling appliance was broken, defective and inoperative, and by reason thereof it was necessary, in order to uncouple said cars from an adjoining car, for men to go between the end of said car and said adjoining car.

8. That it was the duty of said defendant to have said car equipped with a coupler which could be uncoupled without the necessity of men going between the ends of the cars to so uncouple the same. But that said defendant negligently, recklessly and unlawfully failed and neglected to comply with the laws of the United States regarding said couplers,

and negligently failed to fulfill its duty of having the same so equipped with proper couplers as it was its duty by law to do.

9. That by reason of all the facts hereinbefore alleged, plaintiff was severely, painfully and permanently injured, in that the lower portion of his left foot was torn loose from the ankle, plaintiff was run over and his left leg severed and torn from his body, and that plaintiff received severe and permanent injuries to his back, spine, kidneys, liver and sexual organs; and that by reason of said accident plaintiff received a severe and permanent shock to his nervous system, and that plaintiff, in addition to the injuries herein enumerated, received other severe and permanent injuries, the extent and precise nature of which plaintiff is unable to ascertain at this time.

10. That said plaintiff, at and prior to the time of the injuries herein complained of, was an able-bodied, strong and healthy man and was able to and did earn at his work from one hundred and five ($105.00) Dollars to one hundred and fifteen ($115.00) Dollars per month, and that by reason of the injuries herein complained of the plaintiff has been permanently crippled and disabled and will never again be able to do any manual labor whatsoever.

11. That by pleading the specific acts of negligence herein recited, plaintiff does not waive the right to plead any other acts of negligence not herein recited and not inconsistent with the acts herein set forth.

12. That by reason of all the facts hereinbefore alleged and by reason of said injuries to plaintiff, plaintiff has been damaged in the sum of Eighty Thousand ($80,000.00) Dollars, together with his costs and disbursements herein.

Wherefore, plaintiff demands judgment against the said defendant for the sum of Eighty Thousand ($80,000.00) Dollars, together with his costs and disbursements herein.

DAVIS AND MICHEL,
Plaintiff's Attorneys,
Marshall, Minnesota.

Dated this 8th day of October, 1913.

(Title of Cause.)

ANSWER.

The defendant answering the complaint of the plaintiff herein:

1. Admits that the allegations contained in paragraph 1 of plaintiff's complaint are true.

2. Admits that the plaintiff, H. E. Otos, was on or about the 11th day of September, 1912, employed by this defendant as a brakeman and switchman.

3. Admits that while this plaintiff was so employed he did receive personal injuries in that a car of this defendant ran over his left leg and severed the same from his body, but defendant denies that plaintiff received any injuries other than herein admitted.

4. Defendant, further answering, alleges that such personal injuries as the plaintiff received, whether in his complaint described or otherwise, were not caused by any negligent act or omission of this defendant, but were caused solely by plaintiff's own contributory negligence and carelessness.

5. Defendant, further answering, alleges that the work in which the plaintiff was employed and engaged at the time of his injury involved certain dangers, risks and hazards which are incident to such work, all of which said dangers, risks and hazards plaintiff well knew and appreciated and all of which plaintiff assumed, that plaintiff's injuries resulted from the dangers, risks and hazards so appreciated and assumed by plaintiff as aforesaid.

6. Except as hereinbefore admitted or qualified, defendant denies each and every allegation and each

and every part of each and every allegation in plaintiff's complaint contained.

Wherefore, defendant prays that plaintiff take nothing by this action and that it have judgment for its costs and disbursements herein.

Dated, St. Paul, Minn., October 22, 1913.

M. L. COUNTRYMAN,
A. L. JANES,
Attorneys for Defendant,
203 Great Northern Building,
St. Paul, Minnesota.

(Title of Cause.)

REPLY.

Plaintiff, for his reply to the answer of the defendant in the above entitled action, alleges and shows to this Court:

Plaintiff denies each and every allegation, and each and every part thereof in said answer contained, except as the same admits the allegations of plaintiff's complaint.

Wherefore, plaintiff prays judgment as demanded in his said complaint.

DAVIS AND MICHEL,
Plaintiff's Attorneys,
Marshall, Minnesota.

Dated this October 28th, 1913.

We here print the decision and opinion of the Supreme Court of Minnesota, save as to damages, on the appeal from the order denying a new trial.

There was a subsequent entry of judgment in the District Court, an appeal to the Supreme Court and entry of judgment in the Supreme Court. On the appeal from the judgment entered in the District Court the Supreme Court referred to and gave the same opinion as given on the appeal from the order denying a new trial, all the questions raised on the appeal from the judgment having been raised and presented on the appeal from the order denying a new trial.

OTOS v. GREAT NORTHERN RY. CO.

(No. 18955 [182].)

(Supreme Court of Minnesota. Jan. 29, 1915.)

(Syllabus by the Court.)

1. Commerce—Federal Safety Appliance Act—Employers' Liability Act.

A car in process of transportation from one state to another is in transit and is being used in interstate commerce while being switched at an intermediate yard with other interstate cars, although there may be a purpose to switch the defective car to a repair track for repair of a defective coupler before it leaves the

yard. The federal Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1913, §§ 8605-8612]) and the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]) apply to such a car.

2. **Master and Servant—Injury to Brakeman—Proximate Cause—Federal Safety Appliance Act.**

The act of a switchman in stepping between moving cars to make an uncoupling because of a defective coupler is not the sole proximate cause of an injury received by him while so doing. The violation of the statute is a contributing cause of the injury.

3. **Damages—Personal Injuries—Excessive Recovery.**

The damages as reduced by the trial court are not excessive. Defendant was not entitled to a reduction of the amount of plaintiff's damages because of a prospect that a surgical operation might relieve part of his injury.

Appeal from District Court, Yellow Medicine County; Stephen A. Flaherty, Judge.

Action by H. W. Otos against the Great Northern Railway Company. From an adverse order, defendant appeals. Affirmed.

M. L. Countryman and A. L. Janes, both of St. Paul, for appellant, John I. Davis, of Benson, and Tom Davis and Ernest A. Michel, both of Marshall, for respondent.

HALLAM, J. [1] Plaintiff was a switch foreman in defendant's yards at Willmar. On September 11, 1912, a train came into Willmar from the west. It contained, among others, a loaded car from Willow Lake, S. D., consigned to Minneapolis. This car was

coupled with automatic couplers to a car consigned to Duluth, by way of Superior, Wis. The pin lifter on the Minneapolis car was out of order. At Willmar the Duluth car was to be transferred to another train. There is some evidence that the Minneapolis car was to be switched to the repair track, before it proceeded further, for the purpose of repairing the coupler. There is no evidence that it was ever so transferred. The car was carried to Minneapolis on the following day. Plaintiff and his crew were engaged in cutting up this train and switching the cars to be removed from it to their proper destination. At the time of the accident he had three cars attached to a switch engine; the Duluth car was in the rear and the Minneapolis car in the middle. Plaintiff was about to cut off the Duluth car in order to switch it to the Duluth track. He stood on the side from which the pin lifter was missing. He could not make the uncoupling from that side without going in between the cars. This he did, and in doing so he was run over and sustained severe injuries.

It is conceded that defendant's road at Willmar is a highway of interstate commerce and that the traffic in which this car was engaged when in transit was interstate traffic, and that if it was in transit at this time, then, under the federal Safety Appliance Acts and Employers' Liability Act, defendant is liable for any injury caused by the defective coupler, and neither contributory negligence nor assumption of risk constitutes any defense. The contention of defendant is that "the condition of the car was such that it had to go to a repair track for repair," that "it was necessary that the through movement of the car be interrupted at Willmar for the purpose of repairs," and that therefore,

"the defective car has been withdrawn from commerce" and was "not in the course of transit."

We are of the opinion that at the time of plaintiff's injury this defective car was in transit and was being used in interstate commerce. A car in process of transportation from one state to another is usually in transit and engaged in commerce from the time it is started upon its passage until the delivery of its cargo at the place of destination. United States v. Colorado & N. W. R. Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893. It is not taken out of commerce because in need of repair, nor because of a purpose to repair it, nor because of a design to set it upon a repair track in due course for that purpose. We need not consider what the situation might have been if this car had been set at rest on the repair track. This had not been done. At the time of the accident it was still part of an interstate train. Its cargo had not reached its destination and was not ready for delivery to the consignee. It was attached to and was being moved with another interstate car, from which it was in due course being uncoupled. Clearly the defective car was in transit and was being used in interstate commerce.

The federal decisions leave no doubt upon this point.

In Delk v. St. Louis & San Francisco R. R. Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590, a car loaded and being used in moving interstate traffic was found with a defective coupler. The car was marked "in bad order," and a repair piece sent for, but the company kept on moving it about in connection with other cars, and finally ordered the injured em-

ployé to couple it to another car. This he tried to do and was injured. It was held that the car in question was being used in interstate traffic.

In C. M. & St. P. Ry. Co. v. United States, 165 Fed. 423, 91 C. C. A. 373, 20 L. R. A. (N. S.) 473, it was said that, if a car is one of the connecting links between the engine and the caboose and a constituent part of a train moving on an interstate mission, the car is engaged in interstate commerce. See, also, Erie R. Co. v. Russell, 183 Fed. 722, 106 C. C. A. 160; Southern Ry. Co. v. Snyder, 205 Fed. 868, 124 C. C. A. 60.

[2] 2. Defendant contends that the proximate cause of plaintiff's injury was not the defective condition of the coupling, but his violation of a rule of the employer forbidding employes going between moving cars. It appears that there was such a rule. There is evidence that in this yard it had, with the knowledge of the yardmaster, been more honored in its breach than in its observance. But, whatever may be said of the propriety of plaintiff's act in going between the cars, it was only one of the concurring causes of plaintiff's injury. The violation of the statute was one cause of his injury. Turrittin v. C. St. P. M. & O. Ry. Co., 95 Minn. 408, 104 N. W. 225; Sprague v. Wis. Cent. Ry. Co., 104 Minn. 58, 116 N. W. 104. This is all that is necessary to create liability The statute which abolishes contributory negligence—

"would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. * * * It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that de-

fendant is free from liability under the act." Grand Trunk Ry. Co. v. Lindsay, 233 U. S. 42, 47, 34 Sup. Ct. 581, 582 (58 L. Ed. 838, Ann. Cas. 1914C, 168, quoting 201 Fed. 844, 120 C. C. A. 166).

In the Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

H. W. OTOS,

Defendant in Error.

ASSIGNMENTS OF ERROR.

Comes now the Great Northern Railway Company, Plaintiff in Error, in the above entitled cause, and avers and shows that in the record and proceedings in said cause the Supreme Court of the state of Minnesota erred to the grievous injury and wrong of the Plaintiff in Error herein, and to the prejudice and against the rights of the Plaintiff in Error, in the following particulars, to-wit:

I.

The said Supreme Court erred in affirming the judgment entered in the District Court in favor of the Plaintiff in Error.

II.

The said Supreme Court erred in holding that at the time Defendant in Error was injured the car with the defective coupling apparatus was being used in interstate commerce and that the provisions of the Federal Safety Appliance Act were applicable thereto.

III.

The said Supreme Court erred in holding that the Defendant in Error at the time he was injured was engaged in work connected with the movement of interstate commerce within the provisions of the Federal Employer's Liability Act.

IV.

The said Supreme Court erred in holding that the car with the defective coupling apparatus had not been withdrawn from interstate commerce at the time Defendant in Error was injured and that the Federal Safety Appliance Act was applicable thereto.

V.

The said Supreme Court erred in holding that the proximate cause of the injury of Defendant in Error was the defective condition of the coupling ap-

paratus, where it appeared that at the time Defendant in Error was injured he was engaged in violating one of the rules of the Plaintiff in Error.

VI.

The said Supreme Court erred in holding that the proximate cause of the injury of Defendant in Error was due to a violation of the Federal Safety Appliance Act.

VII.

The said Supreme Court erred in holding that whether Defendant in Error was engaged in interstate commerce within the provisions of the Federal Safety Appliance Act and the Federal Employer's Liability Act under the evidence in the case was a question of law and not one of fact for the jury.

VIII.

The said Supreme Court erred in holding that at the time Defendant in Error was injured he was acting within the scope of his employment and in the discharge of his duties in going between the cars to make the uncoupling and that the Federal Safety Appliance Act and the Federal Employer's Liability Act were applicable.

IX.

The said Supreme Court erred in holding, under the evidence in this case, that the car with the defective coupling apparatus at the time of the accident, was being hauled or used by the Plaintiff in Error within the provisions of the Federal Safety Appliance Act and the Federal Employer's Liability Act.

X.

The said Supreme Court erred in holding that the car with the defective coupling apparatus, which after the train in which it was carried had arrived at its destination, was being removed from said train to a repair track solely for the purpose of repairs, was engaged in interstate commerce and that the Federal Safety Appliance Act was applicable thereto and the Federal Employer's Liability Act was applicable to the Defendant in Error, who was injured in connection therewith.

XI.

The said Supreme Court erred in holding that the damages allowed to the Defendant in Error were not excessive.

WHEREFORE, For these and other manifest errors appearing in the record, the said Great Northern

Railway Company, Plaintiff in Error, prays that the judgment of the said Supreme Court of the State of Minnesota be reversed and set aside and held for naught, and that judgment be rendered for Plaintiff in Error granting it its rights under the statutes of the United States, and Plaintiff in Error also prays for judgment for its costs.

E. C. LINDLEY,
Attorney for Great Northern Railway Co.,
Plaintiff in Error.

M. L. COUNTRYMAN,
A. L. JANES,
Of Counsel.

carrier from statutory penalties while hauling the defective car to the nearest available point for repair, it does not relieve the carrier from liability for injury to an employé in connection with such hauling.

Under the circumstances involved in this action under the Employers' Liability Act, the trial court did not err in charging that if the injuries were directly due to defective condition under the Safety Appliance Act of couplers of a car which had come from without the State to the point where the accident occurred, and which was destined to another point within the State, the defendant carrier would be liable.

128 Minnesota, 283, affirmed.

THE facts, which involve the construction and application of the Safety Appliance Act in cases for injuries under the Employers' Liability Act, are stated in the opinion.

Mr. E. C. Lindley, with whom *Mr. M. L. Countryman* and *Mr. A. L. Janes* were on the brief, for plaintiff in error.

Mr. Tom Davis, with whom *Mr. Ernest A. Michel* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action under the Safety Appliance Act and Employers' Liability Act. The plaintiff (defendant in error,) was a switch foreman and was breaking up a train that had come into his State from the west. At the moment when he was hurt he had three cars attached to a switching engine; the rear one consigned to Duluth, and to be switched to another track; the next consigned to Minneapolis; both loaded. The automatic coupler on the Minneapolis car was out of order, the pin-lifter was missing, other repairs were needed, and there was evidence that it had been marked for repairs and was to be switched to the repair track before going further. In the switching operation the plaintiff, being unable to uncouple the Duluth car from the side where the pin-lifter was missing without going between the cars, did so while the cars were moving and was badly hurt. The jury was instructed that

if the injuries 'were due directly to the absence and imperfect working condition of the coupler in question' the defendant would be liable. The plaintiff got a verdict and judgment was ordered for $30,000, which order was affirmed by the Supreme Court of the State. *Otos* v. *Gt. Northern Ry.*, 128 Minnesota, 283. 150 N. W. Rep. 922.

The defendant argues that the car had been withdrawn from interstate commerce, and that therefore the Act of March 2, 1893, c. 196, § 2, 27 Stat. 531, does not apply; that if it does apply the defendant was required by that act and the supplementary Act of April 14, 1910, c. 160, 36 Stat. 298, to remove the car for repairs and that its effort to comply with the statutes could not constitute a tort; and that the plaintiff was the person entrusted by it with the details of the removal and could not make it responsible for the mode in which its duty was carried out; that he might have detached the car while it was at rest. But we are of opinion that the argument cannot prevail.

The car was loaded and in fact was carried to Minneapolis the next day. It had not been withdrawn from interstate commerce, but merely subjected to a delay in carrying it to its destination. At the moment of the accident it was accessory to switching the Duluth car. It does not seem to us to need extended argument to show that the car still was subject to the Act of Congress. *Delk* v. *St. Louis & San Francisco R. R. Co.*, 220 U. S. 580. As the Safety Appliance Act governed the case, it imposed an absolute liability upon the carrier. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281. *Chicago, Burlington & Quincy Ry. Co.* v. *United States*, 220 U. S. 559. The supplementary Act of April 14, 1910, c. 160, § 4, relieves the carrier from the statutory penalties while the car is being hauled to the nearest available point where it can be repaired, but expressly provides that it shall not be construed to relieve from liability for injury to an employé in connection with the hauling of the car. The

next section recites that under § 4 the movement of a car with defective equipment may be made within the limits there specified without incurring the penalties, 'but shall in all other respects be unlawful.' Whether or not the absolute liability created by the earlier act extended to the present case, and we are far from implying that it did not, the Act of 1910 imports with unmistakable iteration, that the liability exists. Under the instructions of the court the jury must have found that the defect was the proximate cause of the injury, as that was made a condition of the plaintiff's right to recover. If so, the fact that the plaintiff's conduct contributed to the result was not a defense. Act of April 22, 1908, c. 149, §§ 3, 4; 35 Stat. 65, 66. *Grand Trunk Western Ry.* v. *Lindsay*, 233 U. S. 42. In view of the statutes it is unnecessary to consider the limits to the plaintiff's authority by his instructions from above. In any view of the evidence he was not withdrawn from the protection of the Acts.

Judgment affirmed.